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CONVEYANCER'S NOTEBOOK

THE MYSTERY OF THE HOUSING ACT, 1936

Mr. Edward J. Willmott disagrees with the general proposition stated by Mr. Stern in his article, "Some Developments in the Law Relating to Injurious Affection," published last year (Vol. 19, p. 332), that a local authority acquiring land by agreement has to respect the rights of third parties (at p. 335). The proposition, says Mr. Willmott, requires qualification: where a provincial local authority acquire land by agreement for housing purposes it may well be that the authority does not have to respect the rights of third parties, who may only be entitled to compensation. The reason for Mr. Willmott's caution well appears from his argument, which we endeavour to set out below.

Mr. Willmott agrees with Mr. Stern that if a third party is entitled to compensation his rights are extinguishable and, to see whether he is so entitled, we must find out whether sections 16 to 68 of the Lands Clauses Consolidation Act, 1845, have been incorporated in the statute authorising the purchase. To arrive at the real point of the dispute, Mr. Willmott has to get over Mr. Stern's statement (Vol. 19, p. 341) that purchases of land by a local authority for housing purposes are governed by the Local Government Act, 1933. Part VII of that Act deals with acquisition of, and dealings in, land, but, by section 179 and the 7th Schedule, the Housing Acts, 1925 and 1930 (now the Housing Act, 1936) are excepted from the operation of this Part. Accordingly, purchases by agreement by provincial local authorities for housing purposes are governed by the Housing Act, 1936, s. 74. (London is different: see the Housing Act, 1936, s. 104, which incorporates the Lands Clauses Consolidation Act, 1845, except (*inter alia*) sections 16 to 68).

Having surmounted this preliminary hurdle, Mr. Willmott settles down to his real fight. The 1845 Act can be incorporated in one of two ways, under section 1 or under section 5. Section 1 says, in effect, that the Act is automatically incorporated into an Act authorising the purchase or taking of land, except so far as the special Act otherwise provides. Section 5 provides that where it is convenient to incorporate part only of the Act this may be done. It is hard to see how a draftsman can utilise both sections at the same time. What, then, has the draftsman done in the case of the Housing Act, 1936? In some places, *e.g.*, section 104, section 5 of the 1845 Act has been invoked, but in others, *e.g.*, sections 145 and 147, there being no express incorporation, implied incorporation under section 1 of the 1845 Act appears to have been relied on. In the case of compulsory purchase by any local authority, the Acquisition of Land (Authorisation Procedure) Act, 1946, now governs the matter, but this does not apply to purchase by agreement. Acquisition by agreement by provincial authorities not having been dealt with specifically, we arrive at the conclusion that, apparently, the 1845 Act is incorporated by virtue of section 1 thereof, so that the rights of a third party are merely the subject of compensation. Mr. Willmott's view is supported by Cripps on *Compulsory Acquisition of Land*, 10th ed., Vol. 1, p. 1622 (though Cripps overlooks that London is affected by the Housing Act, 1936, s. 104).

Chancel Repairs

We wonder how many of our readers know what a "Record of Ascertainments" is. It is the record prepared by the Tithe Redemption Commission under the Tithe Act, 1936, 7th Schedule, Part I, showing the rentcharges agreed or awarded on the original commutation of tithes to which chancel repair liability attached, the identity and aggregate amount of the rentcharges which remained liable for chancel repairs on October 2, 1936, and the proportion which each such rentcharge bore to the total amount of such rentcharges. From this, in theory, the liability of a landowner for chancel repairs may be ascertained. In practice, however, the inquiry is difficult in the extreme. The Commission have eased the position by preparing a very workmanlike memorandum (Form No. 1724) which can be obtained by anyone interested, on application to the Commission, 33–37, Finsbury Square, London, E.C.2.

Land Charges

The system of registration of land charges has proved quite ineffective and has been in need of overhaul for some years. When

1955 ebbed away, a period commenced to run during which a land charge could have been registered against an estate owner of which a purchaser searching every estate owner from the statutory root of title onwards cannot know. This period is now only a matter of months but it is little consolation to a purchaser who has been caught to learn that his is an exceptional case. This state of affairs has, of course, been foreseen and as far back as 1954 the Roxburgh Committee was appointed to consider the position arising after 1955, to consider *Re Forsey and Hollebone's Contract* [1927] 2 Ch. 379, and to advise whether amendments of the law ought to be made. At the date of writing this note the committee's report has not seen the light of day.

It is not just a question of tinkering with the system, for practitioners do not know where they are. Some purchasers' solicitors ask in their preliminary inquiries for the names of all estate owners since 1925, but it is surely absurd to investigate the title before a contract is entered into. Even if a purchaser's solicitor has the name of every estate owner he is still not certain that he can stop every hole. For example, if a building society holds its land through trustees, should he search against every trustee? We understand the practice is to register against the building society. Again, when he does find a charge registered against a builder who was developing land in the area of the property in question, it is often impossible to be sure that the charge does or does not affect the property.

There has already been a Report on Local Land Charges (Cmd. 8440), but the legislature has done nothing about it (except to refer it to the Roxburgh Committee). Local land charge search certificates and the answers to the additional inquiries supply useful and important information but they are not by any means exhaustive. Planning applications, notices of liability to compulsory acquisition and applications to rent tribunals might all be dealt with in the official searches. It is proper to mention, however, that our experience is that most local authorities give a great deal of help in answering all reasonable requests for information.

There seems little doubt that, although there may be some small drawbacks, the only effective method of registration is against properties and not persons and it is rumoured that registration of all land charges is to be done by the local authorities. If this is so, it is essential that search certificates should be issued by return of post and if, as seems likely, the searches will have to be done both before contract and completion there should be a system of bringing the first search up to date at a nominal charge. But whatever is going to be done should be done without delay.

NOTES ON PART II OF THE LANDLORD AND TENANT ACT, 1954

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This is the first of a series of articles the object of which is the examination of some of the problems in the working of Part II of the Act of 1954 which, as a result of decided cases or otherwise, have been revealed since the passing of the Act. It is not the Authors' intention to give an exhaustive explanation of the provisions of Part II (*a*) and the title chosen for the series is to this extent apt. Nevertheless, it is hoped to provide something more than a miscellany of unrelated notes and it is intended so far as possible to set each topic in its context. To this end it has been decided to divide the field of inquiry into four parts and to discuss each in turn. The headings chosen for the four parts are as follows (*b*):—

(1) Tenancies to which Part II applies.
(2) The determination of tenancies to which Part II applies.
(3) Applications to the court for new tenancies.
(4) Compensation for disturbance.

It is, of course, not possible to separate the provisions of the Act into watertight compartments. It will therefore often be necessary, whilst discussing topics apposite to one particular head, to have regard to matters pertaining to other titles. In particular many of the statutory definitions cut across all the divisions of the subject and some repetition may be unavoidable. Further the Authors wish to be able to consider future decided cases as they are reported and, from time to time, it may be necessary to tread again paths previously pursued.

I. Tenancies to which Part II Applies

Subject to the exceptions set out in section 43 of the Act, Part II applies to any tenancy where the property comprised in it is, or includes, premises which (i) are occupied by the tenant, and (ii) are so occupied for the purposes of a business carried on

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(*a*) Those readers who require an exhaustive explanation should refer to any of the textbooks on the subject, *e.g.*, Blundell and Wellings, *The Landlord and Tenant Acts, 1927–1954*, or the *Permanent Supplement to Woodfall.*

(*b*) One or two of these heads may require two articles.

by him or for those and other purposes (section 23 (1)). Section 69 (1) defines the word "tenancy" as meaning "a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement. . . ." The minimum requirements, it will have been observed, are that there must be a tenancy and that that tenancy must have been created, if not by some form of lease or agreement for a lease, at least by a tenancy agreement. Subsection (2) of section 69 should not be ignored. It provides: "References in this Act to an agreement between the landlord and the tenant (except in sections 17 and 38 (1) and (2)) shall be construed as references to an agreement in writing between them." Leases, agreements for leases and tenancy agreements are all examples of agreements between the landlord and the tenant in the ordinary sense, but they are, of course, agreements between the *immediate* landlord and the tenant. The words "the landlord" in section 69 (2) mean, however, the person who is "the competent landlord" within the definition in section 44 and Sixth Schedule and that person may be the immediate landlord or he may be a superior landlord. Subsection (2) therefore appears not to be an attempt to define the word "agreement" where it occurs in subsection (1), and for the purposes of the latter subsection it appears to be sufficient if the agreement is oral or even implied. To sum up the requirements for application of Part II are: there must be a tenancy as defined above and the property comprised in that tenancy must be or include premises which are occupied by the tenant (*c*) and are so occupied for the purposes of a business carried on by him (*c*) or for those and other purposes. It is now proposed to consider the application of the Act to certain types of tenancies, businesses and premises.

Tenancies at Will

The Court of Appeal in *Wheeler* v. *Mercer* [1955] 3 W.L.R. 714, has held that a tenancy at will, whether it is created by an express or implied agreement, is a "tenancy" created by a "tenancy agreement" within the above-mentioned definition. In that case Miss Mercer, the tenant of a shop, held over as a quarterly tenant after the expiration of a seven years' term. The quarterly tenancy was determined by notice to quit and during the currency of the notice the tenant gave notice under section 5 of the Landlord and Tenant

(*c*) A tenant who holds the tenancy on trust is allowed to treat occupation and carrying on of the business by all or any of the beneficiaries as his own: see s. 41 (1). As to the meaning of that subsection, see pp. 4 and 5 of *Blundell and Wellings* or the *Permanent Supplement to Woodfall*; and *Frish* v. *Barclays Bank* [1955] 2 Q.B. 541, at 549, 550, *per* Evershed M.R.

Act, 1927, claiming a new lease. Proceedings were commenced in the county court but before the hearing negotiations for a settlement began and the case was adjourned indefinitely. Eighteen months later no settlement had been effected and the landlord commenced proceedings for possession. At no time did Miss Mercer apply under section 5 (13) of the Act of 1927 for an order authorising her to continue in possession until after the termination of the proceedings. According to Denning L.J. the reason for this was that Miss Mercer had for all practical purposes security by the fact of lodging her claim, and that the landlord had not at first taken out a summons for possession against her because he knew it would be countered by an application for security under section 5 (13). "So," Denning L.J. said ([1955] 3 W.L.R. at 717), "Miss Mercer stayed on by mutual consent, pending determination of her claim for a new lease." On one view it might be thought that, so far from staying on by mutual consent, Miss Mercer was merely suffered to remain in the premises because no other practical course in the circumstances was open to the landlord. Nevertheless, the Court of Appeal held that Miss Mercer was neither a tenant on sufferance nor a licensee but was a tenant at will whose tenancy was created by a tenancy agreement. Denning L.J. said (*ibid.*, at 718): "That definition [in s. 69 (1)] is wide enough to include a tenancy at will, because every tenancy at will is created by agreement, express or implied." This observation may be in conflict with a further observation by the Lord Justice (*ibid.*, 719), in which he considered the case of a person who goes in under a treaty for purchase and then the sale goes off. Having said that such a person is not a tenant at will at all (*d*), he continued: "In any case such a person [presumably: on the assumption that he is a tenant at will] does not hold under a 'tenancy agreement' within a definition contained in section 69 of this Act." If this conflict does exist, it would seem on principle that any relationship which constitutes any kind of a tenancy (other than a tenancy on sufferance) is inevitably created by a "tenancy agreement" and that the first observation of the Lord Justice is to be preferred to the second.

A tenancy at will does not appear to be within the definition of term of years absolute in section 205 (xxvii) of the Law of Property Act, 1925, and, therefore, by virtue of section 1 (3) of that Act tenancies at will take effect as equitable interests only. This, however, may not remove tenancies at will from the compass of

(*d*) But (applying *Errington* v. *Errington* [1952] 1 K.B. 290) a licensee. Compare, however, *Dunthorpe & Share* v. *Wiggins* [1943] 2 All E.R. 678 (C.A.); *Woodfall*, 25th ed., pp. 305, 318.

the word "tenancy," since that word is not necessarily confined to tenancies under which legal estates are granted. Under the Rent Acts it has been decided that premises held under a tenancy at will at a rent of at least two-thirds the rateable value are "let" within the meaning of those Acts (see *Chamberlain* v. *Farr* [1942] 2 All E.R. 567) and, by analogy, it would seem that if tenancies at will are to be excluded from the ambit of Part II of the Act of 1954, it is necessary to look further than the definition of "tenancy" in section 69. Indeed it would seem that that definition embraces some tenancies which are equitable in nature: namely, tenancies created by agreements for leases (*e*).

There are three provisions in the Act which invite doubts whether Parliament ever contemplated that the Act would apply to tenancies at will at all. The first provision is contained in section 25 (3) and (4), which require the date of termination specified in a section 25 notice to be not earlier than the earliest date on which apart from the Act the tenancy could have been brought to an end by notice to quit given by the immediate landlord on the date of the giving of the section 25 notice and, in any other case, not earlier than the date on which apart from the Act the tenancy would have come to an end by effluxion of time. There is a corresponding provision in section 26 (2). A tenant at will is not entitled to a notice to quit and his tenancy is, of course, not determinable by effluxion of time. Indeed, it is determinable in a variety of ways (*f*) the chief example of which is a demand for possession. Denning L.J. said ([1955] 3 W.L.R. at 718, 719) that the draftsman had not in mind tenancies at will when he was drafting section 25 (3) and (4) but that since the object of those subsections is to make clear that the section 25 notice must not be given earlier than the common law time, and since tenancies at will are determinable at common law on demand at any time, there was no need to make similar provision for them; the omission of tenancies at will was therefore intelligible in section 25 (3) and (4) without taking them out of the Act altogether. Parallel reasoning explains the absence of reference to tenancies at will in section 26 (2).

The third of the three provisions mentioned above is to be found in section 43 (3) which excludes from the ambit of Part II a

(*e*) For the purpose of the definition it does not seem to matter whether or not a decree of specific performance of the agreement would be granted and, therefore, whether or not the courts would, under the doctrine of *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9, treat the parties as being in the same position as if the lease contracted for had in fact been granted. Of course, a tenant who enters and pays rent under an agreement for a lease in respect of which specific performance is not obtainable usually at law obtains a tenancy from year to year on the terms of the agreement. (*f*) See *Woodfall*, 25th ed., pp. 306 *et seq.*

tenancy granted for a term certain not exceeding three months unless—(a) the tenancy contains provision for renewing the term or for extending it beyond three months from its beginning; or (b) the tenant has been in occupation for a period which (together with any period during which any predecessor in the carrying on of the business carried on by the tenant was in occupation) exceeds six months. There is only one reference in the judgment in *Wheeler* v. *Mercer* to this provision and that is very brief: Hodson L.J. said ([1955] 3 W.L.R. at 720): "It is to be observed that section 43 does not exclude from Part II of this Act (the Part in question here) a tenancy at will." A tenant whose term is for three months certain with no option for renewal is outside the scope of Part II unless he subsequently obtains a tenancy of a class which does qualify under the Act or unless he is able to rely on paragraph (b) of the subsection. On the assumption (which appears to be correct) that section 43 (3) contains no reference, express or by implication, to tenancies at will, the qualification contained in paragraph (b) is inapplicable to them. The remarkable result follows that a tenancy at will, which was described by Baron Parke (*g*) as the lowest estate known to the law, is protected as from its inception. Further, it would seem that a tenant for a term of three months with no option for renewal who holds over for one day thereafter as a tenant at will is from that moment protected whether or not after payment of rent he obtains a weekly or other periodic tenancy (*gg*).

There is no mention in the reports of the judgments in *Wheeler* v. *Mercer* whether or not Miss Mercer, as a tenant at will, paid any rent. One of the points taken on her behalf but not considered in the judgments was that after the expiration of the notice to quit she held over as a yearly or quarterly tenant. Possibly, therefore, she paid rent. However, a person holding over and paying rent usually becomes entitled to a periodic tenancy and, if Miss Mercer had paid rent, one would have expected some explanation in the judgments why despite such payment she had remained a tenant at will. Since the reports contain no such explanation she may have paid no rent at all. In any event the ratio of the decision of the Court of Appeal is so broad that it is capable of application

(*g*) *Doe* d. *Gray* v. *Stanion* (1836) 1 M. & W. 695, at 700.

(*gg*) It seems that weekly and other periodic tenancies are quite unaffected by s. 43 and that they therefore qualify from their inception regardless of the length of time that the tenant has been in occupation. Further it would seem that a tenant who is holding over as a weekly tenant is not disqualified merely because the prior term was for three months or less or merely because he has been in occupation for six months or less. Nevertheless it would be strange if, whilst holding over as a tenant at will prior to the payment of rent (which converts him into a weekly tenant), he were protected.

to any tenancy at will express or implied, whether or not rent is paid. If this interpretation of the decision is correct a non-rent paying tenant at will will be entitled to remain in the premises for at least six months and probably longer (*h*) and throughout that period his landlord (and, in some cases, a superior landlord) will be entitled to no rent in respect of the premises. A further anomaly is that if this same tenant at will's application for a new tenancy is rejected on any of the grounds specified in paragraphs (e), (f) and (g) of section 30 (1) he will be entitled, unless the landlord has been able to contract out of the obligation, to compensation for disturbance under section 37.

These considerations lead one to infer that not only did the draftsman not have tenancies at will in mind when he was drafting sections 25 (3) and (4), 26 (2) and 43 (3) but that also he and, therefore, Parliament did not contemplate that Part II of the Act would apply to such tenancies at all. If this is correct the proper interpretation is that Parliament intended to exclude such tenancies from the application of Part II. It may therefore be that *Wheeler* v. *Mercer* is not the last word on the application of Part II to tenancies at will. The decision is, of course, binding on all courts below the House of Lords, and the ratio is so widely stated that it may be difficult to distinguish the decision unless it can be confined to its own rather special facts or unless the courts are able to make freer use of the principle of *Errington* v. *Errington* ([1952] 1 K.B. 290) in order to infer licences whenever possible in cases in which tenancies at will might otherwise be inferred.

Unlawful Sub-letting

Winkle has a lease containing no prohibition of business user and expiring on March 25, 1956. Winkle does not occupy the premises for business purposes and does not intend to do so. The lease prohibits Winkle from sub-letting without the consent in writing of Pickwick, his lessor, first obtained. Winkle sub-lets in breach of that covenant to Snodgrass who does occupy the premises for business purposes. The breach has not been waived. Pickwick is the competent landlord. Will Snodgrass be protected by Part II of the Act against Pickwick?

Winkle could never rely on the unlawfulness of the sub-letting —the doctrine of estoppel prevents this. As against Winkle Snodgrass appears therefore to possess a tenancy to which Part II of the Act applies. If the sub-tenancy, unless *vis-à-vis* Pickwick it is to be regarded as no tenancy at all, is one to which Part II

(*h*) See s. 64.

applies in relation to Winkle, there seems to be no reason why the same is not true also in its relation to Pickwick. Indeed Part II appears specifically to contemplate that certain types of unlawful *user* shall not prevent the general application of Part II to a particular tenancy or sub-tenancy. See section 23 (4) which excludes from Part II a tenancy or sub-tenancy when the tenant or sub-tenant is carrying on a business in breach of a *general* prohibition against business user but not when the user is in breach of a prohibition of use for the purposes of a specified business or of use for purposes of any but a specified business. See also section 24 (2) which enables the lessor to resort to his normal remedies by way of forfeiture free from any restrictions contained in Part II. Indeed, it may be said that the scheme of Part II, so far as unlawful user and unlawful sub-tenancies are concerned, is that the Act does not inhibit the lessor's remedy by way of forfeiture but that if the lessor does not or cannot make use of that remedy the Act is to apply with its full vigour to the tenancy or sub-tenancy in question. The solution to the problem posed above therefore seems to be that Part II will protect Snodgrass against Pickwick unless and until Pickwick is able to obtain a forfeiture in respect of which no relief is given to Snodgrass.

A further complication may arise as follows: A, the competent landlord, has granted B an unconditional licence to sub-let to C; C's sub-lease does not require A's or B's consent to any further sub-letting to be obtained; C, without such consent, sub-lets to D who occupies the premises for the purposes of his business. Even at common law during the subsistence of B's lease A has no right to be consulted before C sub-lets to D: *Williamson* v. *Williamson* (1874) L.R. 9 Ch. 729. Further the sub-letting by C to D is no breach by B of his covenant not to sub-let without A's consent: *MacKusick* v. *Carmichael* [1917] 2 K.B. 581. At common law, therefore, D's sub-letting is effective during the subsistence of C's sub-letting and, upon surrender by B and C, D will hold directly from A by virtue of section 139 of the Law of Property Act, 1925: see *Wilson* v. *Neville, Reid & Co.* (1916) 32 T.L.R. 542 and 544 (second column of the page), applying *Williamson* v. *Williamson, supra.* If this is the position at common law, it would perhaps be surprising if Part II of the Act of 1954 produced a different result. It would therefore seem that when B's and C's interests in the premises have come to an end D can hold over as against A by virtue of sections 24 (1) and 65 (2) of the Act.

These considerations suggest that tenants and sub-tenants who themselves have no further use for the premises can delay the lessor's right to possession by granting sub-tenancies or sub-sub-

tenancies for business purposes, and that this may be done even during the currency of a section 25 notice served on the tenant or sub-tenant as the case may be. If each person upon whom the premises are allowed to devolve in this way occupies the premises for business purposes each such person, it would seem, is himself entitled to a six months' statutory notice and to apply to the court for a new tenancy. It appears further that this process of annoyance and delay can be extended almost *ad infinitum* by successive sub-tenants. The moral may be as follows:—

(1) for lessors in cases where there is some possibility that this process may be adopted to bargain for surrenders whenever possible (see section 24 (2));

(2) for A the lessor in the above example, when granting a licence to sub-let to C, to impose two conditions:—

(a) that C's sub-lease shall contain a covenant against sub-letting without the consent of both B and A first obtained, *and either*

(b) that B will not waive any breach of that covenant by C, *or*

(c) that A is to be made a party to C's sub-lease (*i*).

If the precautions suggested in (2) above are taken these may not altogether prevent the difficulties discussed above but they will at least provide the lessor with a sanction in the form of remedies by way of forfeiture or damages against all tenants or sub-tenants in the chain.

Furnished Letting

Lettings of business premises which give the tenant the right to use the lessor's furniture are probably rare and for this reason the question whether Part II of the Act applies to such lettings should not often arise. However, the question has once or twice arisen in practice in connection with office premises, and the authors will therefore briefly express their opinion.

In a case where the tenant of business premises holds directly from the freeholder and has the right to use the latter's furniture it would seem that the tenancy is one to which the Act applies. It is true that the Part II contains no reference to furnished lettings whatsoever, but it would seem that if a tenancy is of a kind which brings it within the definition in section 69 (1) particular terms or incidents (of which the right to use furniture is an example) of the tenancy cannot affect the matter in any way. If Part II applies to a tenancy under which the tenant has the right to use the freeholder's furniture, it would be illogical if the Act did not also apply to a tenancy under which the tenant has the right to use an

(*i*) See *Drive Yourself Hire Co.* v. *Strutt* [1954] 1 Q.B. 250.

intermediate lessor's furniture, even if in this case there are difficulties in applying certain provisions of the Act to the circumstances. Such difficulties do exist but it is thought that none is incapable of solution.

Pieces of furniture are chattels as much as any other kind of goods, and it would seem that the right to the use of furniture under the terms of a letting is a personal right which binds no one other than the grantor. Further, it appears that this right does not run with the land or with the reversion at law or in equity: see *per* Lord Mansfield C.J. in *Newman* v. *Anderton* (1806) 2 B. & P.N.R. 224 at 226–227. If, therefore, A, an intermediate landlord whose term expires on December 25, 1956, has granted to B a tenancy of office premises together with the right to use A's furniture for a term expiring on June 24, 1956, it would seem that prior to the determination of B's tenancy there is nothing which A can do, by assignment or surrender of his term or otherwise, to divest himself of his obligation to provide furniture for B and that the assignee or superior landlord does not become so liable. On the assumption that the tenancy is one to which Part II of the Act applies, after June 24, 1956, section 24 (1) by continuing the tenancy will continue A's personal obligation until December 25, 1956. After the latter date, if A quits the premises and B holds over under sections 24 (1) and 65 (2) against the superior landlord, it would seem that A's obligation to provide furniture will cease, that the superior landlord will not be affected by that obligation and will not become liable to provide furniture for the tenant (*k*). However, whether or not the superior landlord becomes liable to provide furniture he is entitled to be paid rent at the full rate, since rent in respect of furniture issues out of the land and not out of the furniture: *Newman* v. *Anderton*, *supra*. If the tenant applies to the court for a new tenancy it would seem that the superior landlord, as competent landlord, cannot be compelled to provide furniture, although if in fact he does not do so some adjustment in the rent would undoubtedly be made (*l*).

Letting of Undeveloped Land

It has been seen that a tenancy is not one to which Part II of the Act applies unless "the property comprised in the tenancy

(*k*) s. 139 of the Law of Property Act, 1925, which is applied by s. 65 (2) of the Act of 1954 may suggest the contrary. If the statement in the text is correct the tenant may perhaps be entitled to an apportionment, see *Woodfall*, 25th ed., pp. 362–363.

(*l*) s. 32 (3) (which reads: "Where the current tenancy includes rights enjoyed by the tenant in connection with the holding, those rights shall be included in a tenancy ordered to be granted under s. 29 of this Act") appears to refer to rights which touch and concern the land and not rights which are merely personal.

is or includes premises which are occupied by the tenant. . . ." There is little doubt that in the case of a tenancy of a bare piece of land with no buildings the land is " property comprised in the tenancy " but there may be a question whether it is " premises." It is sometimes suggested that the latter word is confined in its application to land and buildings. However, it is thought that the word, except where the *ejusdem generis* rule or a particular context may require, is apt to cover both land simpliciter and land with buildings. The use of the word in statutes is probably derived from the practice in leases of referring to the subject-matter as " the premises " or " the said premises " which expressions frequently refer both to land and land and buildings. It is therefore submitted that Part II of the Act will apply to a tenancy for business purposes of a bare piece of land. This view is of importance, because its consequence is that tenancies of farm land with no buildings which for one reason or another (*m*) are not tenancies of agricultural holdings within the meaning of the Agricultural Holdings Act, 1948, are not thereby excluded from the Act of 1954 by section 43 (1) (a) of that Act. Further, a yard or field which is merely used for storage purposes in connection with a business carried on elsewhere must also be within the ambit of Part II.

Occupation: Letting of Flats

The sub-letting of flats for profit can constitute a business: see *Barton* v. *Reed* [1932] 1 Ch. 362. Other considerations apart, it is therefore capable of being a " business " within the definition contained in section 23 (2) of the Act. In the Act of 1927 it was expressly provided that premises in which the tenant carried on the business of sub-letting the premises as residential flats were not to be a holding to which Part I of that Act applied: see section 17 (3) of that Act. The application of Part II of the Act of 1954 to businesses of this kind has now been considered by the Court of Appeal. In *Bagettes* v. *G. P. Estates Co.*, *The Times*, March 6, 1956, p. 5, the tenants occupied premises in which they carried on the business of holding, managing, and letting real property. The premises were divided into thirteen flats, ten of which were occupied by sub-tenants of the tenants. The lease under which the tenants held the premises was about to expire on March 25, 1955, and the tenants asked their landlords to grant them a new lease of the whole of the premises. The landlords declined to do so and took out an originating summons for a declaration that the

(*m*) See *Woodfall*, 25th ed., pp. 1055–1056; *Blundell and Wellings*, p. 6, or *Permanent Supplement to Woodfall*, p. 6.

tenancy was not one to which Part II of the Act applied. The declaration was granted by Wynn-Parry J. (reported in [1955] 3 W.L.R. 602). The Court of Appeal affirmed that decision. The ratio of the decision is to be found in the definition of the word "holding." A tenancy which is continued under section 24 (1) will be of all the property comprised in the tenancy, but unless the landlord otherwise requires (see section 32 (2)) the tenant can obtain a new tenancy of the "holding" only. Section 23 (3) excludes from the definition of that word any part of the premises not occupied either by the tenant or by a person employed by him. Therefore, once the flats were sub-let they were no longer occupied by the tenant and they were not part of the holding. Similarly, three of the flats which had not been sub-let but were vacant were not occupied by the tenants for the purposes of a business. Further, once flats had been sub-let such other parts of the premises as were in fact occupied by the tenants were not occupied for the purposes of a business. The case does not turn on the definition of "business" but it is a decision that in the circumstances the premises were not *occupied* for the purposes of a business, with the result that the tenancy was not one to which Part II of the Act applied.

This decision will apply to a case in which the tenant's business is the sub-letting of offices. More difficult considerations, however, arise where the tenant uses the premises for the purpose of taking in lodgers or paying guests or as a boarding house. In this case the occupation of the lodger or paying guest may be attributed to the tenant, thus enabling him to say that he does occupy the premises for the purposes of a business. In *Hills (Patents)* v. *University College Hospital Board of Governors* [1955] 3 W.L.R. at 528, Denning L.J. said that possession in law is single and exclusive but that occupation may be shared with others or had on behalf of others (*n*).

The Definition of "Business"

The word "business" is defined as including a trade, profession or employment and any activity carried on by a body of persons, whether corporate or unincorporate. In *Hills (Patents)* v. *University College Hospital Board of Governors* [1955] 3 W.L.R. 523, the board of governors sought to resist an application for a

(*n*) In that case the board of governors of a hospital were held, under the National Health Service Act, 1946, to be in such a responsible position in regard to the hospital that even if the Minister who owned it was in occupation of it they also were occupiers. Since they were held to carry on a "business" within the meaning of Part II of the Act of 1954 it followed that they occupied the premises for the purposes of that business: see further, *infra*.

new tenancy under Part II of the Act of 1954 on the ground that they intended to occupy the holding for the purposes of a business, namely, a teaching hospital, to be carried on by them in the holding. The Court of Appeal (Hodson L.J. dissenting) held that the carrying on of the teaching hospital was an " activity " and that the governors, being a body of persons, intended to occupy the premises for the purposes of an activity, and therefore of a business, to be carried on by them in the premises. It is thought that the majority decision of the court places too much emphasis on the word " activity," thus allowing that word to extend the definition of " business " in the case of a body of persons. It would be remarkable if the definition of that word should be wider in the case of a body of persons (particularly in the case of an unincorporate body) than in the case of a single individual. There must be some limit to the meaning of the word " activity " and this limit can be achieved by inserting the word " such " before " activity." However, it is not necessary even to do this since, it is submitted, the purpose of the second part of the definition is merely to ensure that no trade, profession or employment is to be excluded from the definition merely because the trade or profession is an activity carried on by a body of persons. The word " employment " is itself broad enough to cover most occupations such as the carrying on of a teaching hospital: see further, pp. 3, 4, 41 and 42 of *Blundell and Wellings* or *Permanent Supplement to Woodfall.*

PROCEDURE UNDER THE PUBLIC HEALTH ACTS, ETC.

By J. F. Garner, ll.m., Solicitor

Under the modern "welfare state," the private practitioner frequently finds himself asked to advise on action taken, or threatened, by the local authority in respect of his client's property under one or other of the multifarious sections of the Public Health Act, 1936, and allied legislation. Apart from the particular law applicable to the section being used, and (more often) questions of fact arising thereunder, the practitioner should also consider what is gradually becoming a substantial body of law—a collection of unrelated statutory principles and decisions governing the procedure that must be followed by the local authority in putting these sections into operation. These principles and decisions apply, within limits, to a wide variety of cases, and are therefore worthy of detailed study.

(A) Notices

In the first place, provision is frequently made for action to enforce a particular statutory control (*a*) to be commenced by the service of a notice—a "statutory notice" as such a document is known in local government circles. Several points arise in practice, apart altogether from questions of the validity of the action being taken.

(i) *Authority for the Notice.* It should first be ascertained whether there is adequate authority for the initiation of the notice. If the statute provides that a local authority may take the specified action, the whole of the resultant proceedings will be invalid if a notice has been served otherwise than on the express instructions of the authority (*b*); the local authority may delegate their statutory discretion to a committee or sub-committee of their number (*c*), but not to one or more of their officers (*d*), and

(*a*) Such as, *e.g.*, ss. 92–100 of the Public Health Act, 1936 (referred to hereafter as "P.H.A., 1936"), prohibiting the commission of a statutory nuisance, or s. 9 of the Housing Act, 1936, whereby the authority can require an insanitary house to be repaired.

(*b*) Unless the statute—as it does in a very few exceptional cases, such as s. 79 (1) of the P.H.A., 1936—expressly authorises a named officer to act on his own responsibility.

(*c*) Under s. 85 (1) of the Local Government Act, 1933.

(*d*) *Shoreditch Vestry* v. *Holmes* (1885) 50 J.P. 132; *Allingham* v. *Minister of Agriculture and Fisheries* [1948] 1 All E.R. 780.

therefore a notice that has been issued by or on the authority only of an officer is invalid (*e*).

(ii) *Form of the Notice.* Subject to the contrary clearly appearing, " notice " required to be given by a statute will usually mean a notice in writing. If no special form is prescribed, any notice that complies with the statute will be adequate, but if a form of notice is prescribed in the statute itself or in regulations made thereunder, the notice used must comply exactly (*f*) with the prescribed form, unless the regulations (or statute) provide that the prescribed forms shall be followed in those terms, or " substantially to the like effect " (*g*); but even in the latter case no material portions of the prescribed form may be omitted (*h*). The procedure of a statute may be virtually nullified if a notice in a prescribed form is required to be used, and none has in fact been prescribed (*i*).

Where the notice requires works to be executed or " steps to be taken " (*k*), care should be taken to ensure that the very minimum works necessary to comply with the enabling statute are specified, and where a time is stated within which the works are required to be executed, this must be reasonable (*l*).

(iii) *Signature of the Notice.* The executive act of signing a notice, as distinct from the discretionary function of deciding whether or not a notice should be served in the particular circumstances, may be deputed to an officer by the local authority concerned, but care should be taken to ensure that the signing officer is properly authorised so to do, both by the enabling statute (*m*),

(*e*) It is submitted that subsequent ratification by the local authority of action so taken by an officer on his own initiative will cure any defect through lack of authority; see, by analogy, the cases on ratification by the Crown, such as *Buron* v. *Denman* (1848) 2 Exch. 167. Action taken on the instructions of a committee can subsequently be adopted by the council: *Agnew* v. *Manchester Corporation* (1902) 67 J.P. 174.

(*f*) A trivial flaw in a notice served under the Small Tenements Recovery Act, 1838, the form being scheduled to the Act, was held fatal in *Delaney* v. *Fox* (1856) 1 C.B.(N.S.) 166.

(*g*) As in the Housing Act (Form of Orders and Notices) Regulations, 1937 (S.R. & O., 1937, No. 78).

(*h*) In *Rayner* v. *Stepney Corporation* [1911] 2 Ch. 312, a notice which omitted a note stating that the person on whom the notice was served had a right of appeal, and which note appeared in the prescribed form, was held invalid.

(*i*) As occurred for a short time under the Landlord and Tenant Act, 1954.

(*k*) *e.g.*, enforcement notices under s. 23 of the Town and Country Planning Act, 1947.

(*l*) See, *e.g.*, *Ryall* v. *Cubitt Heath* [1922] 1 K.B. 275.

(*m*) If the wrong officer signs the document, the notice will be invalid, as in *Becker* v. *Crosby Corporation* [1952] 1 All E.R. 1350, where a notice to quit a council house was held invalid because it had been signed by the housing manager instead of the town clerk.

and by the local authority themselves (*n*). It is generally recognised that in the absence of some express statutory authorisation (*o*) the clerk to the authority (*p*) is the appropriate officer to sign statutory notices (*q*).

In modern practice the "signature" of the authorised officer will not always be appended by the officer himself signing with pen and ink. The following other cases may arise:—

(a) The officer may use a rubber stamp on which his signature (or his name, in printed letters) is engraved. This is apparently, a good signature, provided, it is submitted, that it is not established that the stamp was actually wielded by some person other than the authorised officer (*r*).

(b) A stencil is used, where the wax from which the copies are taken has been signed by the authorised officer; here probably the signature is acceptable, but the case where the notice includes a printed facsimile signature is more doubtful (*s*).

(c) Signature by some person other than the authorised officer, using that officer's name (whether or not it is indicated that the signature has been appended by an agent) is apparently valid in a common law case, provided it is established that the agent had adequate authority so to act (*t*). Where, however, the statute provides that a particular officer should sign the notice, it is submitted that a personal signature in some form is required (*u*).

(iv) *Service of the Notice.* The method of service is customarily prescribed by the enabling statute, and usually a fairly long list of alternative methods is provided. If no special procedure is prescribed, presumably personal service on the recipient will have to be established. If the statute permits service by post (*a*), possibly

(*n*) This should sometimes be signified under seal (as, *e.g.*, under the Small Tenements Recovery Act, 1838, by virtue of the definition of "agent" in s. 7 thereof).

(*o*) As, *e.g.*, in s. 284 of the P.H.A., 1936, where a variety of officers are authorised to sign documents "relating to matters within their respective provinces."

(*p*) Or his deputy: Local Government Act, 1933, s. 115 and s. 116.

(*q*) In many cases the statute is silent as to how notices are to be signed; see, *e.g.*, Public Utilities Street Works Act, 1950.

(*r*) *Goodman* v. *J. Eban Ltd.* [1954] 1 Q.B. 550 (a case of a solicitor's bill); *Bennet* v. *Brumfitt* (1868) L.R. 3 C.P. 28.

(*s*) Such a signature was accepted, however, for a private street works notice in *Brydges* v. *Dix* (1891) 7 T.L.R. 215.

(*t*) *L.C.C.* v. *Vitamins Ltd.* [1955] 2 All E.R. 229, following *France* v. *Dutton* [1891] 2 Q.B. 208.

(*u*) "It has always been recognised that, certainly in some statutes, the context may demand a personal signature": *per* Parker L.J. in *L.C.C.* v. *Vitamins Ltd. supra*, citing *Hyde* v. *Johnson* (1836) 2 Bing.N.C. 776, a case under the Statute of Frauds Amendment Act, 1828.

(*a*) As under, *e.g.*, s. 285 of the P.H.A., 1936.

by registered post only (*b*), proof of posting will have to be established, but the court will, unless the contrary is proved, presume delivery of a notice or other document on the day on which it would normally be delivered in due course of post (*c*).

Sometimes the enabling statute requires or permits the local authority to serve a notice on the owner *or* (*d*) the occupier of the land concerned. In such a case the courts cannot in general interfere if the party served feels that the other party ought to have been the one selected as recipient of the notice. In some cases, however, the statute gives a right of appeal expressly on this ground (*e*); in others the statute may give an unrestricted right of appeal to any "person aggrieved," and here the court will allow an appeal to be brought on the ground that the notice has been served on the wrong person (*f*).

(v) *On whom should the notice be served?* This question may be answered, in practice, in two ways: first, on the owner or the occupier, as above mentioned, and secondly, on "A. B." because he is the owner or the occupier. The local authority are entitled to ascertain the nature of the interest in the property enjoyed by particular individuals, by serving a "requisition for information" on the occupier of the premises, which must be answered, under pain of a penalty (*g*). Who is the "owner" or the "occupier," for the purposes of the P.H.A., 1936 (or some other enabling statute), is often, however, a complicated question of legal definition.

The expression "owner," as used in these statutes does not usually mean of necessity the owner of the fee simple estate in the land; indeed the writer has at times been tempted to wonder whether the draftsmen of the P.H.A., 1936, and of the Housing Act, 1936, had any very deep tuition in the conveyancer's art. In section 343 (1) of the P.H.A., 1936, "owner" is defined as meaning "the person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether

(*b*) As under, *e.g.*, s. 167 of the Housing Act, 1936.

(*c*) Interpretation Act, 1889, s. 26.

(*d*) Sometimes the notice must be served on both the owner *and* the occupier, as for example, enforcement notices under s. 23 of the Town and Country Planning Act, 1947.

(*e*) See P.H.A., 1936, s. 290 (3) (e).

(*f*) This was the *ratio decidendi* of the cases on s. 75 of the P.H.A., 1936, known in local government circles as the "dustbin muddle," namely, *Croydon Corporation* v. *Thomas* [1947] K.B. 386, and *First National Housing Trust Ltd.* v. *Chesterfield R.D.C.* [1948] 2 K.B. 351. This particular trouble has now, happily, been cured by s. 8 of the Local Government (Miscellaneous Provisions) Act, 1953, and *Peterborough Corporation* v. *Holdich* [1955] 3 W.L.R. 626.

(*g*) P.H.A., 1936, s. 277; Housing Act, 1936, s. 168; Town and Country Planning Act, 1947, s. 106.

on his own account or as agent or trustee for any other person, or who would so receive the same if those premises were let at a rack-rent," and the term " rack-rent " in this definition " in relation to any property means a rent which is not less than two-thirds of the rent at which the property might reasonably be expected to let from year to year, free from all usual tenants' rates and taxes, and tithe rentcharge (if any), and deducting therefrom the probable average cost of the repairs, insurance and other expenses (if any) necessary to maintain the same in a state to command such rent."

A rent collector or a trustee acting on behalf of an owner may be an owner himself for the purposes of this definition, but his liability is expressly limited by the enabling statute (*h*), and if the receiver's duty is merely to pay a cheque for rent, handed to him by the tenant, into the landlord's bank, this will not normally constitute him an owner within the definition (*i*). Agents and trustees apart, however, it seems that there can be only one person who is at any one time the owner of particular property for the purposes of this definition (*k*).

The term " occupier " is not defined in the P.H.A., and his identity is usually readily ascertainable as being " the person residing or having the right to reside in or upon any house, land or place " (*l*). In the case of a factory, the occupier " has been described as being " the person who runs the factory (*m*), and a receiver and manager was held to be the occupier for this purpose (*n*). A statutory tenant will normally be an occupier (*o*), and a limited company is capable of being an occupier (*p*).

(B) Enforcement of Notices

If the notice is duly prepared and served, the next question that arises is, what are the powers of the local authority in the event of the recipient of the notice not complying with it and failing to execute the works or to take the steps specified in the notice. The means of enforcement provided by the statutes we are considering

(*h*) P.H.A., 1936, s. 294; Housing Act, 1936, s. 10 (3), explaining the term " person having control," which is used in that Act in much the same sense as " owner " in the P.H.A.—the owner of that Act being much nearer to the conveyancer's idea of an owner—see s. 188 (1) thereof; Town and Country Planning Act, 1947, s. 24 (5) (d), under which regulations have been made applying s. 294 of the P.H.A., 1936 (see S.I. 1948, No. 1380, reg. 8).

(*i*) *Bottomley* v. *Harrison* [1952] 1 All E.R. 369.

(*k*) *Corporation of London* v. *Cusack-Smith* [1955] 1 All E.R. 302, decided on the similar definition in s. 119 (1) of the Town and Country Planning Act, 1947.

(*l*) Mozley and Whiteley's *Law Dictionary*.

(*m*) *Cox* v. *Cutler & Sons Ltd., etc.* [1948] 2 All E.R. 665.

(*n*) *Meigh* v. *Wickenden* [1942] 2 K.B. 160.

(*o*) *Brown* v. *Minister of Housing and Local Government* [1953] 1 W.L.R. 1370.

(*p*) *Pegler* v. *Craven* [1952] 2 Q.B. 69.

are two in number, namely, prosecution and action in default; either or both (*q*) of these means of enforcement may be at the disposal of the local authority in the particular case.

(1) *Prosecutions.* In many of these statutes, prosecutions may be instituted only by the local authority for the district, or by a person aggrieved, or by some other person authorised by the Attorney-General (*r*). Although offences against these statutes are "crimes" in the juristic sense, and may be prosecuted under the Summary Jurisdiction Acts (*s*), in many cases the ordinary common law right of any member of the public to institute criminal proceedings has been abrogated by the statute (*t*).

Where the local authority are initiating a prosecution, it must be proved that they have authorised the particular officer to lay the information, either specially or generally (*u*), unless the officer is entitled to bring the particular proceedings in his own name as a member of the public (*a*).

(2) *Proceedings in default.* In a number of cases, when a local authority have served a notice requiring specified works to be executed, and the person served fails to comply with the terms of the notice, the statute gives (*b*) the authority power to enter on the premises and execute the work themselves. Where such a power exists, the local authority must, of course, await the expiration of the period originally allowed the person on whom the notice was served, and then in order to obtain entry on the premises, they must carry out the appropriate procedure laid down in the statute (*c*). Having so entered the premises, the authority must execute the works specified in the notice—and no others—with all reasonable expedition (*d*). When the works have been completed, the statute normally empowers the local authority to recover their expenses (*e*), reasonably incurred on the work, from the person in

(*q*) See, *e.g.*, P.H.A., 1936, s. 290 (7).

(*r*) *Ibid.*, s. 298.

(*s*) *Ibid.*, s. 296; the reference should now be to the Magistrates' Courts Act, 1952.

(*t*) On this subject, see an interesting article by Dr. Glanville Williams in [1955] Crim.L.R. 668, at p. 673.

(*u*) *Bob Keats Ltd.* v. *Farrant* [1951] 1 All E.R. 899.

(*a*) As, for example, under the Food and Drugs Acts: *Snodgrass* v. *Topping* (1952) 116 J.P. 332.

(*b*) Sometimes the power may be exercised only after a court order has been obtained, as, for example, under s. 58 or s. 94 of the P.H.A., 1936.

(*c*) *e.g.*, under s. 287 of the P.H.A., 1936. If the appropriate notice is not first served, the local authority will be liable in trespass; see *Stroud* v. *Bradbury* [1952] 2 All E.R. 76.

(*d*) If these rules are not complied with, the power to enter on the land will have been exceeded, and the local authority will be in the position of trespassers.

(*e*) "Establishment expenses," not exceeding 5 per cent. on the expenses reasonably incurred may be added under s. 292 of the P.H.A., 1936, and certain other statutes, but *not* under the Housing Act, 1936.

default. The statute further usually provides the means whereby those expenses, with interest (*f*) thereon, may be recovered. The methods usually provided for are:

(i) by action, in any court having competent jurisdiction (usually the local county court (*g*));

(ii) summarily, as for a civil debt before the local magistrates (*h*);

(iii) by a charge on the land, in which event the local authority will have the remedies of a mortgagee under a deed creating a legal mortgage (*i*), and having priority over other charges (*k*); it is in many sections provided that the payment may in such a case be demanded from *any* owner of the land (*l*);

(iv) by making an order that the money shall be paid by instalments, each of which instalments (if unpaid) then become a charge upon the land (*m*).

Where recovery may be made only against the actual person who was in default (*n*), no charge is created on the land, this remedy being available only where payment can be demanded from the *owner* of land as such. If there is a charge, it will be registrable in the local land charges register, and, if not so registered, the *charge* will not be enforceable against subsequent purchasers for value (*o*), but non-registration cannot affect a statutory right to demand payment from "the owner for the time being" (*p*).

The statute of limitations runs against the local authority as

(*f*) The standard maximum rate is at present 5¼ per cent.: Public Health (Rate of Interest) Order, 1955 (S.I. 1955, No. 1869), made under s. 291 (3) of the P.H.A., 1936, and Housing (Rate of Interest) Order, 1955 S.I. 1955, No. 1874), made under s. 10 (3) of the Housing Act, 1936.

(*g*) Proceedings in the county court may be brought as an alternative to summary proceedings before the magistrates under s. 293 of the P.H.A., 1936, and this jurisdiction will not be excluded simply because some of the preliminary matters may be capable of being decided in special proceedings under some jurisdiction given by another section of the Act to the magistrates alone: *Great Yarmouth Corporation* v. *Gibson* [1956] 1 All E.R. 113.

(*h*) Magistrates' Courts Act, 1952, s. 50; proceedings must be commenced within six months of the date of the demand.

(*i*) The powers given under the Law of Property Act, 1925, will apply, provided the charge is registered in the local land charges register, as the attributes of Class B land charges (which by s. 11 of that Act are so enforceable) are applied to local land charges by s. 15 (2) of the Land Charges Act, 1925.

(*k*) Whether by way of mortgage (*Paddington Borough Council* v. *Finucane* [1928] Ch. 567), or by way of rentcharge (*Bristol Corporation* v. *Virgin* [1928] 2 K.B. 622), or otherwise.

(*l*) As in s. 291 (1) of the P.H.A., 1936.

(*m*) Enforcement can be made, however, only in respect of instalments in arrear: *Payne* v. *Cardiff R.D.C.* [1932] 1 K.B. 241.

(*n*) As in s. 13 of the Housing Act, 1936.

(*o*) Land Charges Act, 1925, s. 15 (1).

(*p*) As, for example, in s. 14 of the Private Street Works Act, 1892.

from the date of demand for payment (*q*), but if the time has once run out and the land is subsequently acquired by a purchaser, there is nothing to prevent the local authority then demanding payment afresh—more than twelve years after the first demand—where they are authorised by the statute so to demand from "the owner for the time being" (*r*).

(C) Remedies Open to Person Served

It remains to discuss the remedies open to a person served with a notice requiring him to execute works, under some section of the Public Health Acts or allied legislation.

(i) *Appeals.* In most cases, the statute gives any "person aggrieved" (*s*) a right of appeal against the notice. Usually this lies to the local magistrates (*t*), but sometimes the local county court is given jurisdiction (*u*). Sometimes again, the grounds on which an appeal may be lodged are prescribed in the statute (*a*), and in some cases the grounds of appeal are at large (*b*). Where particular grounds are specified in the statute, and no appeal is in fact lodged within a specified time, the statute usually provides that such matters may not subsequently be raised in other legal proceedings (*c*).

(ii) *Self-Help.* If the person receiving the notice contends (and is subsequently able to prove) that the notice is a nullity, he may by reasonable force resist any entry made by the local authority's servants or agents purporting to be made under the authority of the statute (*d*), and if he is then prosecuted for obstruction, he will be able to plead the illegality of the entry as a defence (*e*). Similarly,

(*q*) The charge must be enforced within twelve years, but proceedings on the demand must be taken within six months in the magistrates' court or six years in the county court; under the P.H.A., 1875, the six-months limit applies also to the county court: *Tottenham Local Board* v. *Rowell* (1876) 1 Ex.D. 514.

(*r*) *Dennerley* v. *Prestwick U.D.C.* [1930] 1 K.B. 334.

(*s*) Any person who considers himself to be aggrieved may appeal as such, for until a decision has been given on his appeal, no one can say whether he is in fact aggrieved: *R.* v. *Surrey (Mid-Eastern Area) Assessment Committee, ex p. Merton and Morden U.D.C.* [1948] 1 All E.R. 856.

(*t*) As, *e.g.*, under s. 290 of the P.H.A., 1936, or s. 23 (4) of the Town and Country Planning Act, 1947.

(*u*) As, *e.g.*, under s. 15 of the Housing Act, 1936.

(*a*) See s. 290 (3) of the P.H.A., 1936.

(*b*) As, *e.g.*, under s. 75 of the P.H.A., 1936. In a case arising under this section (*Croydon Corporation* v. *Thomas* [1947] K.B. 386), it was argued that as the grounds of appeal specified in s. 290 (3) of the Act did not apply to proceedings under this section, no appeal could be lodged on one of these specified grounds. The court held, however, that where the power was "to appeal," without more, the appellant was entitled to raise any matter he wished.

(*c*) See s. 15 (5) of the Housing Act, 1936, and the cases on enforcement notices under s. 23 and s. 24 of the Town and Country Planning Act, 1947.

(*d*) As was done in *Stroud* v. *Bradbury* [1952] 2 All E.R. 76.

(*e*) *e.g.*, under s. 287 of the P.H.A., 1936.

he may decide to sue the local authority in trespass for illegal entry. Further, he may defend any proceedings brought by the local authority for breach of their notice, where such a prosecution will lie, and he may eventually defend any proceedings brought against him for the recovery of expenses incurred by the local authority acting in default (*f*).

(iii) *Compensation.* In some cases—in particular where he is served with a notice to the effect that the local authority intend to construct a public sewer through his land (*g*)—a landowner may be able to claim compensation from the local authority under section 278 of the P.H.A., 1936. Such a claim will not lie in any case where he has a right of recourse to the courts of law (*h*).

(iv) *Prerogative writs.* If the local authority are guilty of some illegality, a person affected may be able to apply for an order in the nature of one or other of the former prerogative writs of *certiorari*, *mandamus* or prohibition. This remedy is mentioned for the sake of completeness, but in the class of case we are here considering, the question is not likely to arise.

(D) Conclusion

Although our preceding remarks have been in general terms, we should warn readers that care must be taken in ensuring that the general rules apply to the particular statutory provision in question. Thus, most of the sections of the P.H.A., 1936, which empower a local authority to serve a notice to execute works, incorporate the provisions of Part XII of that Act (*i*), but a few sections (*j*) do not incorporate that Part, and the provisions relating to the abatement of statutory nuisances have almost a complete procedural code of their own (*k*). The Town and Country Planning Act, 1947, so far as enforcement notices are concerned, has incorporated many of the provisions of the P.H.A., 1936 (*l*), but *not* the definition section, and the Clean Air Bill now before Parliament as at present drafted (*m*), will apparently incorporate the whole of

(*f*) The danger of taking this sort of "strong line" is that he may find his substantive grounds of defence have been shut out by reason of his failure to raise them on an appeal against the notice.

(*g*) Under s. 15 of the P.H.A., 1936.

(*h*) The claim will also lie only in circumstances that would be actionable were it not for the protection given by the statute: *Rhodes* v. *Airedale Commissioners* (1876) 1 C.P.D. 402.

(*i*) Including the important s. 290 (3), specifying the grounds of appeal.

(*j*) See in particular s. 24 (maintenance of sewers) and s. 75 (provision of dustbins).

(*k*) ss. 92–100.

(*l*) Town and Country Planning (General) Regulations, 1948 (S.I. 1948, No. 1380) made under s. 24 (5) (d) of the 1947 Act.

(*m*) See clause 25 thereof.

Part XII of the 1936 Act, including the definitions. The Food and Drugs Act, 1955, also incorporates some of the procedural provisions of the P.H.A., 1936 (*n*), and those provisions will therefore apply also to the important regulations made, or having effect under the 1955 Act (*o*). The Housing Act, 1936, on the other hand, is in no way dependent on the P.H.A., 1936, for its procedural provisions, having a complete apparatus of its own—and there are several differences from the apparently similar Public Health Act procedure (*p*), invented no doubt by the draftsman to trap the unwary local government officer to the advantage of the legal practitioner in private practice!

(*n*) See s. 131 of the 1955 Act.

(*o*) In particular the Milk and Dairies Regulations, 1949 (S.I. 1949, No. 1588), and the Food Hygiene Regulations, 1955 (S.I. 1955, No. 1906).

(*p*) For example, the requirement of registered instead of ordinary post (as in s. 285 of the P.H.A.) for service (s. 167), the absence of a provision corresponding to s. 292 of the P.H.A. (establishment expenses), and the different definition of "owner" (in s. 188 (1)).

THE EFFECT OF SECTION 56 (1) OF THE LAW OF PROPERTY ACT, 1925

By D. W. Elliott, B.A., Solicitor

(*concluded from page* 60)

Cases Other than those Concerned with Land

There is a line of cases, mostly concerned with insurance policies, where one person contracts with a second that the second shall make some payment to a third. For convenience we shall call these persons donor, covenantor and donee respectively. The result of these cases seems to be that, except in the special case of a policy under the Married Women's Property Act, 1882, unless the language used is so imperative that the donor constitutes himself a trustee for the donee, the arrangement confers no rights, either at law or in equity, on the donee; he can neither sue the covenantor for the stipulated payment, nor insist that the donor sue for his benefit, nor, unless there is a presumption of advancement or evidence from the circumstances of an intention to make an advancement, can he keep any sums which have been paid to him by the covenantor. It is then argued from this that section 56 is powerless to help the donee, but it is hoped to show that, although the arrangement confers no right to sue on the donee independently of the statute, it does not follow that section 56 does not confer such a right.

Cases Decided Before 1926

The first case is *Cleaver* v. *Mutual Reserve Fund Life Association* (*a*) where the court was concerned with a Married Women's Property Act policy taken out by a man in favour of his wife who subsequently murdered him. It was admitted that under the Act there was a trust for the widow; the question was whether in the peculiar circumstances of the case she should be prevented by a rule of public policy from enforcing it. There was thus no need to consider whether, apart from the Act, she had any rights in the policy moneys, but two of the judges had no doubt that she had none. Esher M.R. (*b*) said that as between executors and widow the clause in the policy requiring payment to the widow

(*a*) [1892] 1 Q.B. 147.
(*b*) *Ibid.*, at p. 152.

would have no effect; and Fry L.J. (*c*), while admitting that the contract between the insurers and the assured would be broken by non-payment to the widow, said that the cause of action would rest not in her but in the executors of the assured. She was a stranger to the contract, which might be ended by the parties and breach of which would give her no cause of action against anyone.

Cleaver's case was followed by *Re Engelbach's Estate* (*d*). There a testator took out an endowment policy in his own name. The proposal form named the proposer as "E. C. E. for his daughter M. N. aged one month." The policy provided that the policy money was to be paid to the daughter (therein called "the nominee") if she survived a certain date; if not, there was to be a return of premiums to the testator, his executors and assigns. The testator paid the premiums. When, after his death, the daughter survived the relevant date, the insurers paid the money to her. The executors then claimed it from her and succeeded. Romer J. held that the case was covered by *Cleaver* v. *Mutual Reserve Fund Life Association* and quoted with approval the opinions of Esher M.R. and Fry L.J. above mentioned. He then went on (*e*): "It follows from that that in the present case, the daughter could not have enforced the contract in her own name against the insurance company and that she was an absolute stranger to the contract, which could have been put an end to by both contracting parties without her consent. It also follows from that decision that the mere fact that the policy moneys were to be paid to somebody other than the assured does not make the assured a trustee of the policy or of the policy moneys for the person so nominated." He then considered whether the rest of the document showed an intention on the part of the assured to constitute himself a trustee and held that it did not.

Both these cases proceed on the basis that since the donee is a stranger to the contract, his only chance of succeeding is to invoke the assistance of equity. Since he is a volunteer he must show that there is a completely constituted trust in his favour. If there is no complete transfer of the subject-matter of the gift to him (or a trustee for him), he must show that the donor constituted himself a trustee for him (*f*). Failure to show this puts him out of court, but, as Romer J. said at the beginning of his judgment (*g*),

(*c*) *Ibid.*, at p. 157.
(*d*) [1924] 2 Ch. 348.
(*e*) *Ibid.*, at p. 353.
(*f*) See the remarks of Turner L.J. in *Milroy* v. *Lord* (1862) 4 De G.F. & J. 274.
(*g*) [1924] 2 Ch., at p. 351.

if the daughter in *Re Engelbach's Estate* could have shown a complete advancement to herself she would have succeeded although a volunteer, because her relationship with the testator raised a presumption of advancement. He said (*h*): "the daughter could of course successfully claim these moneys if she had at the date of the death of the testator a legal right to them, that is to say a right at law to recover the moneys from the society, because, although that legal right might have been given to her purely voluntarily by her father, still there would be no resulting trust in favour of the father, seeing that there would be a presumption of advancement. The only other ground upon which the daughter could claim the moneys as against the executors of the father would be that the father in some way constituted himself a trustee for the daughter of the policy and of the moneys payable thereunder."

So until 1926 the donee failed because there was no declaration of trust in his favour and no complete advancement. There was no complete advancement because he had no legal right to claim the policy moneys. These cases no doubt accurately reflect the state of the law at that time, and the earlier cases (*i*) which had decided that the donee *had* the legal right to claim the policy moneys from the insurers and then turned on whether or not there was a resulting trust for the donor were almost certainly wrong.

Cases Decided Since 1925

The appearance of section 56 on the Statute-book caused no immediate stir—indeed the first reported case in which it was so much as mentioned seems to have been *Re Ecclesiastical Commissioners for England's Conveyance* (*j*) in 1936. Until 1938 no one thought of pleading the section in the *Engelbach* type of case, and only once was the attempt made by a disappointed beneficiary to show that the policy constituted a declaration of trust in his favour. This was in *Re Clay's Policy of Assurance* (*k*), where a policy was made under section 11 of the Married Women's Property Act in favour of the assured's wife and daughter. Unfortunately, the daughter was an adopted daughter and therefore, according to Farwell J., outside the scope of the Act. Before the policy matured, the assured and his wife purported to surrender it without the

(*h*) *Ibid.*
(*i*) *Re Richardson* (1882) 47 L.T. 514; *Re a Policy No. 6402 of the Scottish Equitable Life Assurance Society* [1902] 1 Ch. 282.
(*j*) [1936] Ch. 430, *supra*, pp. 48 *et seq.*
(*k*) [1937] 2 All E.R. 548.

consent of the daughter, and it was held that they were entitled to do so. Farwell J., in holding that there was no trust in favour of the daughter, apart from the statute, followed *Re Engelbach's Estate*; he also quoted the opening passage in Romer J.'s judgment set out above and applied it to hold that since the daughter had no legal right to sue the insurers on the policy, there was no advancement in her favour.

Re Sinclair's Life Policy; Re Foster

1938 saw two cases where section 56 was relied on. In the first, *Re Sinclair's Life Policy* (*l*), Farwell J. held that in the circumstances there was no declaration of trust in the donee's favour, and then went on to consider the argument that section 56 would assist him. After holding that " a reasonable construction " must be put on the section, he held that " whatever the section did mean " it did not apply to this case. " . . . The infant is no doubt a person named in the policy as a person to whom the money may be paid, but in my judgment that is not sufficient to enable him to take advantage of the section and recover and retain the money as his property. Although the infant is a person who might have received the money if Mr. S. had lived till the policy came to maturity and made no claim to it, or if Mr. S.'s executors made no claim to it, he is not a person who, as between himself and Mr. S. or Mr. S.'s executors, is entitled to require payment of the money to him. This section cannot, in my judgment, give him a beneficial title to the policy moneys if apart from the section he has no such title. Moreover, even if he could recover the moneys under this section, since he has no beneficial interest in them, he would hold them as trustee for the executors, who could call upon him to account to them. Under these circumstances the section does not assist the appellant (*m*)."

The core of this argument seems to be in the words, " this section cannot . . . give him a beneficial title to the policy moneys if apart from the section he has no such title." This proposition, it is submitted, is correct only provided that the expression " beneficial title " is not equated (as the context seems to equate it) with " the right to recover the moneys." It will appear hereafter that the donee may have a beneficial title without any right (independently of the section) to sue the covenantor. The question whether he has such a beneficial title *vis-à-vis* the donor depends upon (*inter alia*) whether he was intended to have such a title.

(*l*) [1938] Ch. 799.
(*m*) [1938] Ch., at p. 805.

So the judge should ask himself, did the donor intend to benefit the donee by the policy? If the answer is "no," then he is merely a "person to whom the money *may* be paid" and section 56 does not affect the position. But if the answer is "yes," then it is submitted that the section will apply, even though, independently of the statute, no right to sue anyone at common law or in equity is given to the donee. It will be suggested that once the intention to benefit the donee is discovered, it is no longer conclusive against him to show that there was no proper assignment of the policy to him nor any declaration of trust in his favour (*p*).

Farwell J. ends his judgment by saying that even if the statute permitted the donee to claim the moneys from the insurers, he could not keep them *vis-à-vis* the donor "because he has no beneficial interest in them." Presumably he means because there is a resulting trust; but surely any presumption of resulting trust would be rebutted in this case, not indeed by a presumption of advancement (the donor was not *in loco parentis* to the donee), but by ample evidence of an intention to make a gift afforded by the surrounding circumstances—for example, the fact that the donee was the donor's godson, or that the donor handed the policy to the donee's father for him to collect on it on maturity (*pp*). Indeed the argument is that the statute would not permit the donee to claim unless there was evidence or a presumption that he was intended to benefit.

This case was followed a few months later by *Re Foster* (*q*), where Crossman J. was concerned with a similar policy taken out by a father on the life of his son. The point of Crossman J.'s decision was that before section 56 can apply, the donee must on the proper construction of the document in question be the person "to whom the policy purported to grant the legal right to receive the policy money or with whom a contract to pay the policy money is made by the policy" (*r*).

In spite of the fact that the policy in question provided that the money should be paid to the donee or his assigns, the learned judge held that the donee was a mere nominee to whom section 56 was of no assistance at all. If one grants that this construction of the policy is the correct one, few would cavil at Crossman J.'s decision; no one would say that a mere nominee is "within the scope and benefit of the covenant." Indeed, it can be argued that this is the basis of all the decisions reviewed above. On the

(*p*) *Re Schebsman, deceased* [1944] Ch. 83, *infra*, p. 120.
(*pp*) Farwell J. expressed himself in no doubt but that the donor meant to benefit the donee and that by means of the policy.
(*q*) (1938) 159 L.T. 279.
(*r*) *Ibid.*, at p. 282.

true construction of the policies in those cases the third party is no more than a nominee because there is no trust declared in his favour, no intention that he shall sue, no promise that the donor shall sue on his behalf, no intention that the donor may not change his mind and declare another nominee before the promised payment is made, no right in the covenantor to pay only the nominee. Thus construed, it becomes impossible to spell out of the policy any intention by the parties to benefit the third party, and although such a construction is sometimes somewhat hard to swallow, *e.g.*, in *Re Sinclair's Life Policy*, once made, it leads inevitably to the conclusion that the third party is no more than a complete stranger who was not intended to benefit but who would benefit (at law, anyway) by the contract's enforcement.

Re Stapleton-Bretherton

This explanation of the antecedent insurance cases was accepted by Simonds J. in *Re Stapleton-Bretherton* (*s*). He suggested that in those cases the insertion of the name of the nominee as the destination of the covenanted payment is tantamount to using the words "or as the covenantee may direct." It would in such a case be open to the covenantee to give the covenantor fresh instructions as to the destination of the money, and it would not be open to the covenantor, and still less to the nominee, to insist on payment to the latter. "Where, on the other hand," says Simonds J. (*t*), "the proper inference is that the destination of the payment is, to the covenantor, an essential part of the bargain, it cannot be varied except by the consent of both contracting parties." The case before him concerned a deed of covenant entered into by two brothers, E and F, whereby E agreed with F that in certain events (which happened) E would make certain payments to F's widow. F died and E was at all times ready and willing to make the payments to the widow. Simonds J. had no difficulty in holding that as a matter of construction, the destination of the payments was an essential part of the bargain, so that E was entitled to pay the widow and could not be compelled to pay it to the covenantee's executors, or indeed to any other person.

Had this reasoning, which was approved by the Court of Appeal in *Re Schebsman, deceased* (*u*), been adopted in the earlier cases, the position would have been that although the donee could not insist on payment to himself, neither could the donor insist on payment to himself nor to anyone other than the donee. It is true

(*s*) [1941] Ch. 483.
(*t*) *Ibid.*, at p. 486.
(*u*) [1944] Ch. 83.

that this proposition in itself gives no right to the donee, and that the contracting parties together could alter the destination of the promised payment, but the fact that the donor could not do so unilaterally is vital to the next link in the chain of argument which would allow section 56 to assist a person in the donee's position.

RE SCHEBSMAN, DECEASED

The next link is forged by *Re Schebsman, deceased* (*v*), which concerned an agreement between two companies and their servant whereby by way of compensation for the loss of his office, the companies agreed with the servant to make certain annual payments to his wife and daughter. The servant having gone bankrupt, his trustee in bankruptcy sought a declaration that sums paid since bankruptcy belonged to him, resting his argument on several grounds, only one of which is material to our purpose.

The trustee admitted that he had no claim at law to oblige the companies to make the payments to him rather than to the donees, but urged that in equity he could claim back payments made since the bankruptcy, and in properly constituted proceedings could claim from the companies payments not yet made by them. He argued that as the debtor had provided the consideration for the payments they were in the nature of voluntary gifts. Had they been completed, the presumption of advancement arising in the case of a wife and child would have prevented him from claiming them back, but here the gifts were not completed because the donees could not claim them at law (here he relied on the passage in Romer J.'s judgment in *Re Engelbach's Estate* (*w*) above quoted (*a*)). Therefore, as against the donees, the trustee could have intervened, and the result of such intervention would have been that any payments made thereafter could not have been regarded as advancements and would be held by the donees on a resulting trust for him.

Greene M.R. (*b*) met this argument by saying that since the debtor as between himself and the companies could *not* intervene and require payment to anyone other than the donees, he had, *vis-à-vis* the donees, made a complete advancement by setting in train a piece of machinery which he had no power by his unilateral act to stop and which, unless stopped, would inevitably result in the payments being made to the donees. The fact that the contracting parties could together have abrogated the contract meant no more than that limited powers of revocation had been reserved,

(*v*) *Supra*.
(*w*) [1924] 2 Ch. 348, at p. 351.
(*a*) *Supra*, p. 15.
(*b*) [1944] Ch., at pp. 91 *et seq*.

and it was also immaterial that the donees might have no claim at law. If Romer J.'s dictum meant that one could not have a completed advancement unless the donee could claim at law, Greene M.R. flatly disagreed with it. Luxmoore L.J., concurring (*c*), also thought that the unstoppable machinery set in motion by the debtor meant that he had made a complete gift, and distinguished *Engelbach's Estate* on the ground that there the covenantor was no more than a mere mandatory in making the payment to the donee. Du Parcq L.J. (*d*) agreed and considered that any interference by the donor or his trustee would have been a wrongful act on his part, at least a breach of contract and perhaps a tort or even a crime.

It will be noted that in this case the question of whether the donees could sue was not in issue, and indeed it was expressly held to be immaterial to the main question of whether there was a complete gift, although the learned Lords Justices thought that they would not be able to sue. Section 56 was not therefore mentioned; but it is submitted that the ratio of this case goes a long way to dispose of the arguments formerly used to debar a claim made under the section.

Vis-à-vis the donor the donee has a good title to any payments made or to be made to him—nothing the donor himself can do can stop the donee from getting and keeping any payments which the covenantor may make to the latter. Consequently, Farwell J.'s objection in *Re Sinclair's Life Policy* (*e*) that the donee is not a person who *as between himself and the donor or his executors* is entitled to require payment of the money to him, is seen to be beside the point (*f*), as is the dictum that the section cannot give the donee any *beneficial* interest which he does not *otherwise* have (*g*). The proposition that if the donee were actually paid anything he would have no beneficial interest in the money and must return it to the donor (*h*) is plainly wrong, at any rate in all those cases where the intention to make a gift is either presumed or disclosed by the evidence. Here it is as well to remember that, although in the insurance cases the judges have usually (*i*) refused to spell out a declaration of trust, in all those cases the intention

(*c*) *Ibid.*, at p. 100.
(*d*) *Ibid.*, at p. 101.
(*e*) [1938] Ch. 805, *supra*, p. 117.
(*f*) Suppose the covenantor made the stipulated payment to X, on trust to hold it for whoever was beneficially entitled as between donor and donee. It is submitted that, except in a case where the covenantor had been a mere mandatory, the donee would be entitled, on the authority of *Re Schebsman, decd.* [1944] Ch. 83.
(*g*) [1938] Ch. 805.
(*h*) *Ibid.*
(*i*) For an exception, see *Re Webb* [1941] Ch. 225.

of the donor to make provision for the donee is all too evident (*j*) and would in the case of a completed gift rebut any presumption of a resulting trust.

And Farwell J.'s argument in *Re Clay's Policy of Assurance* (*k*), based on Romer J.'s dictum in *Re Engelbach's Estate* (*l*), that the donee must show a declaration of trust by the donor or a legal right in the donee to sue the covenantor is erroneous so far as the second alternative is concerned; the choice facing the donee is of showing a declaration of trust or a completed gift, which does not necessarily mean a legal right to sue the covenantor.

The result of *Re Schebsman* is that an arrangement of the type found in that case, in which the destination of the covenanted payment is of importance to the parties (which is surely but another way of saying that the parties intend to benefit the third party), constitutes a complete advancement with the donee entitled to keep payments made to him and the donor powerless to stop such payments from reaching him. While it may be true to say that neither at common law nor in equity does the arrangement confer any right on the donee to sue anybody on the covenant, it is surely not too much to say that in such a case the donor *purported* to confer such a right on him. Surely the donee falls within the scope and benefit of the deed according to its true construction, so that by virtue of section 56 he can enforce it in his own name?

Re Miller's Agreement

The great obstacle in the way of realising this is undue concentration on the point that the donor's arrangement confers no right on the donee *independently* of the statute as if this point concluded the argument. A good example of this misdirected concentration is provided by *Re Miller's Agreement* (*m*) where the donees were put under the singular necessity of showing that the arrangement in question conferred no rights on them either at law or in equity. Pursuant to an agreement dissolving a partnership, the continuing partners entered into a deed of covenant with the retiring partner whereby the former covenanted with the latter that as from the latter's death they would pay certain annuities to his widow and daughter. The annuities were in fact paid after the retiring partner's death, and the Revenue claimed that the

(*j*) Which is why the construction placed on the policy, that the third party is a mere nominee, is not what one would expect having regard to the surrounding circumstances of each of these cases.

(*k*) [1937] 2 All E.R. 548, at p. 551, *supra*, p. 116.

(*l*) [1924] 2 Ch., at p. 351, *supra*, p. 115.

(*m*) [1947] Ch. 615.

annuitants were liable for estate duty under the Finance Act, 1894, s. 2 (1) (d) on annuities purchased by the deceased to the extent of the beneficial interest accruing or arising on the death of the deceased. Wynn Parry J., having found that the payments were purely voluntary and that apart from section 56 the arrangement conferred on the donees no rights either at law or in equity, went on to consider the effect of section 56.

After reviewing the dicta on the section occurring in *Re Ecclesiastical Commissioners for England's Conveyance*, *White* v. *Bijou Mansions*, *Re Sinclair's Life Policy* and *Re Foster*, Wynn-Parry J. continued (*n*): "I think it emerges from these cases that the section has not the effect of creating rights but only of assisting the protection of rights shown to exist. Whether or not a right exists is the first question. . . ." If this were so, the section would in truth have very little meaning. The suggestion is that its only effect is the simplification of procedure. If you show a right, which must mean such an interest as would be protected in a court of law or equity, section 56 will allow it to be enforced at your suit. But what kind of right, protected by law or equity, is there which cannot be enforced by its owner? Surely what the section means is that if you show that a right was *intended* to be enforced by you, then section 56 allows you to enforce it, although by the rules of common law or equity you could not have enforced it, in other words, although by those rules you would have no right. In truth *this* is what the *Ecclesiastical Commissioners* case, *White* v. *Bijou Mansions* and *Stromdale and Ball, Ltd.* v. *Burden* decided. In none of those cases was a right protected by law or equity successfully conferred on the donee under the rules of common law or equity, but in the *Ecclesiastical Commissioners* and *Stromdale* cases, the donor purported to do so and section 56 allowed his purpose to be effective (*o*). If this is not creating rights it is difficult to imagine what is. It is impossible to say that in those cases all that the section did was to assist in the protection of rights already shown to exist.

In *Re Miller's Agreement*, Wynn-Parry J. (*p*) admitted that *Re Sinclair's Life Policy* and *Re Foster* were distinguishable on the grounds that there the persons claiming the moneys were nominees, whereas this case was on all fours with *Re Schebsman*. On the authority of *Re Schebsman* then, the arrangement in *Re Miller's Agreement* was a complete advancement, and it becomes difficult, if

(*n*) *Ibid.*, at p. 621.
(*o*) While in *White* v. *Bijou Mansions* he did not purport to do so, so that the section did not apply.
(*p*) [1947] Ch., at p. 621.

not impossible, to say that the donees did not fall within the scope and benefit of the covenant, or that the contract was not made directly for their benefit. But according to the learned judge, the case was concluded against the Revenue and section 56 was inapplicable once he found, as he did find, that the agreement conferred no rights on the widow and daughter independently of the section.

Summary

The conclusion which it is submitted ought to be drawn from the cases discussed in the second part of this article may be summed up as follows. Where a man takes out a policy of insurance whether on his own life or on that of a third party, and it appears from the wording of the policy and from the surrounding circumstances that he intends to make provision for the third party, then that third party can sue on the policy in his own name and keep the proceeds. This, of course, is subject to the proviso that in the ordinary case, until the donee adopts the contract by suing on it or receiving money under it, the donor and insurers between them can vary or put an end to the contract without reference to the donee. It is beside the point to argue that the wording of the policy does not constitute a declaration of trust in the donee's favour; or that there has been no legal assignment of the policy to him. To show that the donor intended to benefit the donee is to show that he made a complete advancement in the sense that, not he, but the donee is beneficially entitled to any payments that are made; which is but another way of saying that on the true construction of the document in the light of surrounding circumstances, the donee comes within the scope and benefit of the insurers' promise to pay the insurance moneys. The only cases where section 56 will not help the third party are those where the donor shows no present intention to benefit him at all—where the proper inference is that he contemplates a *locus poenitentiae* before making the gift a complete one by either assigning the policy to the third party or making a declaration of trust in his favour. The common case would be where the policy contains a clause allowing the donor to surrender it before maturity, but even in such a case, if maturity is reached without any surrender having taken place, it would then be too late for the donor to take back his gift.

Conclusion

It is hoped that this review of the cases where section 56 has been considered justifies the view that those dicta are wrong which

suggest that section 56 only assists in the protection of rights already shown to exist, and the true rule is that if parties to a contract concerned with property mean their contract to benefit a third party directly, that third party can enforce the contract under section 56.

AVOIDING SCYLLA AND CHARYBDIS

(personified in the Agricultural Holdings Act, 1948, and the Landlord and Tenant Act, 1954)

By J. F. Mackeson, b.a., Solicitor

" Yes, Goddess," I replied, " but there is more I wish to know. Could I not somehow steer clear of the terrors of Charybdis, yet tackle Scylla when she comes at my crew ? "

Odyssey, Book 12.
E. V. Riew's translation

An additional hazard now awaits the draftsman who wishes to prepare an agreement for the agricultural use of land which shall not constitute an agricultural holding within the Agricultural Holdings Act, 1948 (herein referred to as the 1948 Act). That hazard is provided, probably unintentionally, by Part II of the Landlord and Tenant Act, 1954 (herein referred to as the 1954 Act), which provides security of tenure for business, professional and other tenants. Part II applies

> " to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those or other purposes " (s. 23 (1)).
>
> " In this Part of this Act the expression ' business ' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate " (s. 23 (2)).

Section 43 provides that Part II shall not apply to the tenancy of an agricultural holding, while the definition of tenancy in section 69 appears to exclude licences (important as will appear later).

The danger is that a letting of farm land which does not comprise an agricultural holding under the 1948 Act, may nevertheless be a tenancy to which Part II of the 1954 Act may apply. The definition of business is wide and would appear to cover the normal activities of a farmer.

At this stage let us consider some tenancies of farm land which are not contracts of tenancy under the 1948 Act:—

I. Tenancies under section 2 of the 1948 Act—

(a) A tenancy for less than a year which has received prior approval of the Minister.

(b) A tenancy made in contemplation of the use of the land for grazing or mowing during some specified period of the year.

(c) A subtenancy granted by a tenant mentioned in paragraphs (a) and (b) above.

II. Possibly a lease or tenancy for a fixed term exceeding one year but not exceeding two years, or a periodic tenancy with a periodicity exceeding one year.

The same situation will also arise if there is any other way of letting farm land so as not to constitute a contract of tenancy under the 1948 Act.

The matter is clearly not a mere legal paradox, since it is believed that the permission given by section 2 of the 1948 Act is widely employed for the letting of odd pieces of accommodation land up and down the country. One of the results would be that even if the letting is for a period of at least three months but less than a year, as it is likely to be, it will be automatically continued, and if the landlord wishes to terminate he has to give at least six months' notice, and then in turn such a notice gives the tenant a right to apply to the court for a new lease (if the tenancy is for less than a year the tenant does not have the right to apply for a new tenancy, unless the landlord serves notice to quit as above mentioned). In the background too will lurk the compensation provisions of Part II. This very summary outline of the tenant's rights will be enough to show that the situation may well be serious. It is discussed in Blundell and Wellings on *The Landlord and Tenant Acts, 1927 and 1954* at p. 6. The learned authors point out that the matter is not free from all doubt, and that it may be argued that land which has no buildings on it may possibly not be premises within section 23 (1) of the 1954 Act. To the present writer this seems the thinnest of planks in this legal shipwreck, for are there not many businesses which as part of their activities require the use of land without buildings? Scrap-merchants, motor-garages, boat repairers, quickly come to mind. Furthermore a tenancy of grass land may well include a stable or shed, and it would be illogical to make the question turn on whether or not there are buildings on the land.

There is, however, one loophole which is mentioned by Blundell and Wellings. Section 2 of the 1948 Act applies to licences as well as to tenancies, while, as mentioned above, Part II of the 1954 Act clearly does not include licences. The distinction had as far as section 2 was concerned become rather unimportant. However,

with this new threat it becomes a vital point, and clearly all agreements intended to take advantage of section 2 of the 1948 Act should be drafted as licences. Since also the law of licences seems clearly to allow of an exclusive licence, it seems possible to draft a type of licence which while safeguarding the licensor, will also secure to the licensee that which he has bargained for. The writer has attempted a draft of such a licence which is printed at p. 702.

The writer has never much liked the lease for over one year and less than two (see his remarks thereon in Vol. 16, at p. 318). To transform such a lease or tenancy into a licence in order to keep it out of Part II of the 1954 Act seems the height of artificiality and not likely to commend itself to any court which had to consider its legal effect. However, if it is to be used to prevent the creation of a contract of tenancy under the 1948 Act, it seems advisable to draft it also in the form of a licence.

THE ECONOMICS OF THE CONVERSION OF OLD DWELLINGS

By C. Bernard Brown, l.r.i.b.a.

As buildings age they must inevitably present problems to their owners for, originally built to particular requirements and circumstances, to survive they have from time to time to be adapted to meet often vastly changed conditions.

It is frequently very difficult to advise whether a building is worth retaining and a successful decision will depend upon several factors which it is hoped can here be clearly placed before you.

Factors to be Considered

There are many advantages which an old building can possess compared with a new one, but the most important of all is that it would have been built at a time when costs were very much lower than they are today and, economically at least, the most successful conversions will be those which put the *cubic contents* of any building to maximum use.

If external additions are made at the much higher costs of today that advantage will be reduced and, if the amount of internal and general rehabilitation is large, may vanish so that it might be cheaper to build anew, unless other considerations are more important. These may include a mature garden compared with the site of a new house or a central position when building sites are expensive or hard to find in populated areas. Again, older houses usually have much thicker walls of better insulation value, ceilings are higher, timbers stouter and the general construction mostly of a better standard than can be afforded today.

Generous old-fashioned plans often provide extra storage and cupboard space only available now at considerable cost, and boundaries, outbuildings, footpaths and drives are all available at a much lower cost than the provision of new ones.

A further considerable advantage can be the acquisition of a property at a price which reflects its poor condition, thus allowing for the necessary expenditure to remedy defects. This advantage can be lost if a purchase price is too high in relation to its condition, and before deciding to renovate doubtful property it is wise to consider whether the fabric justifies the introduction of new, expensive, materials and labour, or whether its original standards

of construction are poor, or its regular maintenance has been neglected, or if a high purchase price has to be paid.

The old-fashioned house which is expensive to run is likely to become more difficult to sell, forcing the owner into a decision either to rehabilitate or to take a more moderate price in order to make it economically sensible for a new owner to convert.

Importance of Expert Advice

The average owner and adviser does not always have sufficient information upon which to come to a conclusion upon the advisability of conversion, and if the chances of an expensive mistake are to be cut to the minimum, some initial expense must be faced. Lawyers, architects, surveyors, builders and estate agents can all make their contribution. Their knowledge of local conditions, Rent Acts, planning, by-laws, costs and values will be all important, and any economy regarding their advice will prejudice the full success of any scheme.

Whatever the type of conversion there are rules which apply when the intention is to provide for *owner-occupation*. Different rules apply when the intention is *to let*. They are altered again where the whole or part is *to be sold*.

A different view can be taken of a conversion for the personal use of an owner rather than for letting or for sale. Personal extravagances and unusual features do not have to make such economic sense if they are going to be the subject of considerable pleasure for many years and there is no serious intention of considering what they will eventually sell for. There is no need for this to be carried to the extreme, and where it is more important to obtain value for money the best combination will be a sound fabric into which well-designed fittings and fixtures have been introduced.

Generally speaking, most buildings suitable for the sole occupation of the owner are small, whether they are cheap or expensive. Larger buildings may be considered as possibilities for part-occupation by the owner with the remainder as an investment. Other properties can be considered for investment only.

Planning the Conversion

How does one decide about the suitability of a property for conversion? Possible buildings can perhaps be divided into the following categories:—

(1) Those originally erected for non-domestic use.

(2) Buildings now too large for single occupation.

(3) Houses where improvements and alterations can improve standards.

Whichever type is to be converted, after due consideration has been given to all available preliminary advice the success of the scheme must finally depend upon the planning skill in using the original cubic content of the building to its maximum advantage.

Is it to remain as one house but altered and improved? Is vertical or horizontal division wisest from the planning, constructional and financial points of view? Upon that depends the decision whether houses or flats will be the answer or whether it is unwise to proceed further.

Upon the planning problems associated with any new building are superimposed the limitations and complications of an out-of-date layout. Too many conversions in the past have arrived at seemingly the easiest (but often relatively the most expensive) solution because sufficient trouble has not been taken to exhaust all the alternative possibilities, and a disappointing result will be likely if it is imagined that there is any short cut to the most satisfactory solution.

Houses

Improvements to existing houses do not present many planning problems. In the vertical division of a building into separate houses the important thing is to look for walls of sufficient thickness and continuity of vertical construction to form party or dividing walls without the expense of making them stronger or thicker. The next important requirement is to group all plumbing arrangements together (preferably out of sight and away from frost) for economy of installation and operation.

It is not proposed to enlarge upon such conversions as they are so often for *owner-occupation* and so much depends upon individual considerations.

Flats

Where flats are concerned and the conversion must also be considered as an investment, any scheme must take particular account of financial considerations. Whether the rehabilitated building is to be part owner-occupied, part investment, or wholly the latter, it is wise to consider keeping each self-contained unit as small as possible, and to consider very carefully the standard of internal amenities to be provided. At present day building prices both the external fabric or shell and the internal fittings (cupboards, decorations, etc.) can be very expensive. A warning

has been given about building new brickwork additions, and it must be repeated in regard to internal standards where the investment return is the first consideration.

The units should be kept as small as possible because, wherever the situation of the property, it is almost certain that a relatively better letting or purchase figure will be obtained for the smaller flat. To enlarge upon this, let us take the example of an existing large family flat consisting of two reception rooms, 4–5 bedrooms, two bathrooms, cloakroom, kitchen, etc., originally let for, say, £300 per annum exclusive. This would have a market limited to those who could afford to pay this yearly sum. If it were divided into two flats comprising one reception room, two bedrooms, etc., these flats would immediately interest those who could afford £150 per annum exclusive. There are many more in this financial stratum competing for the available accommodation, and they are joined by those who could afford the £300. Faced with retrenchment because of the high cost of living, they are likely to accept half the accommodation at the same rent in order to economise on the heavy maintenance costs of running the large flat, and this tends to create a higher value for the smaller units. Thus it is safe to assume that the value of each flat will tend to move upwards to the original figure for the whole.

Generally speaking, if flats are finished too elaborately with fitted wardrobe cupboards, refrigerators, cookers, etc., etc., it is certain that the cost will be high and by no means so certain that any tenant will either sufficiently appreciate the extra amenities or be willing to pay properly for them. It is far better to leave them to provide these items at their own expense. By the time the tenancy is at an end they will, in any case, be either outmoded or worn out.

In providing large flats the occupants expect higher standards. The provision of central heating and constant hot water would be inevitable. These are both costly to instal and to maintain, the amount allowed for them rarely being covered by the flat rental in these days of continually rising costs.

The type of person taking a large flat will possibly want a second bathroom or cloakroom, passenger lift, hall porter, etc. All these push up capital costs, and drive the owner into seeking his tenants in a higher, and therefore smaller, rental stratum.

In the smaller, less expensive unit, however, space heating can be achieved by coal fire, gas or electric means at the tenant's own cost. The same can apply to the hot water supply with the owner, at most, having to supply the gas or electric appliance for the tenant to run at his own expense.

Except possibly in locations where a passenger lift, hall porter, etc., are justified by the high rentals obtainable, it is wise to avoid a conversion of the size where they might be justified, unless fool-proof provision can be made in the leases for maintenance increases as they arise.

Some landlords seem to think the larger unit with a more settled family atmosphere produces a better class of tenant. There will possibly be fewer void periods occurring with the chance of an expensive redecoration following each one, but as more normal letting conditions apply in the future these losses will in any event be inevitable.

Maisonettes

Maisonettes should not be planned if some other solution is at all possible. There are, of course, exceptions where they are feasible, *e.g.*, over shops or to a certain extent where there is a lift. In pre-war days, however, maisonettes were the first to fall and remain vacant in the property slumps of the early and late thirties. They will incline to do so again when current shortages have been met. One of the paramount reasons for flats being preferred to houses is their compact, all-on-one-floor, easily-run maintenance. Maisonettes are "houses at the top of a house" without any of the advantages of garden, facilities for children, etc., which houses enjoy.

From a property investment point of view, although supplying about double the floor area and cubic content, it is rarely possible to charge more than half as much again for what should be practically double the rent, for only one bathroom and kitchen are saved compared with providing a small flat on each floor. An investor is therefore faced with the maximum capital and redecoration costs with a comparatively inferior security and income.

Tenants wanting the larger accommodation of a maisonette really require, and mostly prefer, a house. They may be forced into a maisonette as a temporary measure but will almost certainly leave it when houses become more freely available.

How the Legal Adviser Can Help

It is not easy for professional advisers to give their clients the best possible direction regarding a conversion until their varied experience is collated.

The lawyer will be able to advise generally on local conditions and his experience of values, and on the Rent Acts and other laws affecting property values. But until he has consulted the architect

and surveyor who, in their turn, have recourse to the quantity surveyor (possibly) and the builder, he will not be completely equipped to give the best advice about the conversion of a building into flats.

It should be remembered, too, that as one is appealing to theoretical and yet unknown tenants, considerable and detailed thought must be given in planning for an imaginary person's average requirements. Current trends, class and position of property etc., must be borne in mind against the background of likely capital expense and rentals to be obtained.

It must be pointed out to clients that investment in property can be very different from stocks and shares. They would not be able to buy or sell within a matter of hours in the same way as they could on the stock market, neither would they be assured of a steady fixed income with a reasonable chance of capital accretion upon resale as with a first-class share. Unless they managed the property themselves they would have to pay at least 7½ per cent. management fee to an agent, and this can often account for the net income.

Conversion in letting

About the only thing which remains static with any conversion which is carried out for letting purposes is the gross rent. The outgoings have the habit of fluctuating, usually in an upward direction and at the expense of the owner. The permanently unknown liability for repairs is the main cause of income loss. Settlement, dry-rot, or other major misfortune can play havoc with net figures and several years income can disappear virtually overnight. Their cost can be partly recovered by means of a maintenance claim, but this only affects recovery of Schedule "A" tax and then only after it has been paid and more expense and time has been incurred in prosecuting the claim.

Bad debts and voids can also reduce net income, and if rent has to be recovered through the courts this can seriously affect the net return.

It is unusual for property investors to make allowance in rental income for capital improvements, and yet these will almost certainly have to be carried out in order to achieve fresh lettings and maintain income over a long period of years; it is not a question of a once-and-for-all capital outlay at the beginning. Such expenditure should strictly be allowed for on a progressively higher basis, materials and labour costs tending to rise as the years go by.

There is possibly no other form of investment which is subjected to so many uncertainties as properties for letting. Until the

Housing Act, 1954, flat conversions were subject to the Rent Acts and nobody seriously believes flats provided after this date will forever remain uncontrolled. They run the risk of earning fixed rental income whilst outgoings will always be unpegged and at fluctuating and usually increasing levels.

If let furnished they would presumably still be subject to Rent Tribunals who, with due respect, cannot possibly take into account the (so often) unexpected expenditure which the experienced property owner knows is always around the corner.

This must all lead up to the conviction that the conversion of property for *letting* is not an economic proposition. Under present-day legislation and conditions the local authorities, with the aid of subsidies, are the only ones able to undertake the economic provision of homes for letting purposes.

One is forced to the conclusion that capital is better invested in steadier, more negotiable, securities, and this is said with due regard to the subsidies offered to private owners in the Housing Acts, 1949 and 1954. The majority feel there are still too many onerous conditions attached to the grants to make conversions, with their aid, worth while.

Sale of flats

Having arrived at this conclusion it may appear contradictory to say that flat conversions can be made economically sensible to all concerned if they are sold as individual units.

Since the war, the sale of individual flats freehold or on long lease has proceeded apace. There are many reasons for this breaking down of what amounted to a prejudice against the acquisition of a portion of a building. Quite apart from current shortage of accommodation, the public realise that if they prefer to live in a part of a property in a locality they enjoy, it is much more sensible than a whole house in a district they do not like.

The older houses have many advantages including larger rooms, and people do not then miss so much coming from the spaciousness of a house into a flat. The converted portion of the property they buy would cost about double the purchase price they pay if they had it built at today's prices, and even then it might not be in a position they want. The costs of upkeep, furnishing, heating, cleaning, repairs, etc., etc., are all very much reduced compared with a house. Many with families grown up have since the war sold houses in the £4,000–£8,000 range and purchased flats for £1,500–£2,500, reinvesting the balance of their capital and reducing their annual expenses, thus maintaining a standard of living which they were in danger of losing.

The public appear to be fully aware of all the advantages and are themselves creating the demand. This is hardly surprising for it is only falling into line with almost every other country in the world, including Scotland, where the advantages have been appreciated for over 500 years.

Post-war experience has indicated that some in legal circles here are reluctant to be convinced about the desirability of individual flat sales. Some critics consider it a temporary phenomenon created by post-war shortages which will disappear when more normal times return. Will this, in fact, happen? Will owners of property be prepared to let with all the uncertainties entailed? Will the public want the trouble and upkeep expense of the larger units? The pre-war movement towards preferring to purchase rather than "pay rent with nothing tangible to show for it" has many followers today. Where, however, are the cheaper, economical to run, homes to meet this demand? It can surely be most sensibly met by the purchase of a flat. With building costs likely to rise rather than decrease, the gulf between new house costs and existing flat buildings is likely to widen, making the latter an even more worthwhile proposition.

Sale of Flats in Practice

During the last twenty-five years the writer has been peculiarly fortunate in having the opportunity of studying the several circumstances affecting this type of residential property. As an architect and surveyor he has seen how capital and maintenance costs have risen some three to four times since 1939. As a reluctant landlord (by a bequest) the disappointments and losses associated with Rent Act controlled property have been experienced. As a controlled tenant, the progressive deterioration of a worthwhile building has, perforce, had to be watched sympathetically but helplessly. As an amateur lawyer—and what landlord today can afford not to so equip himself—the knowledge gained has created an uncompromising prejudice against the letting, under present conditions, of residential property.

The conviction grew that the only fair and workable solution for all concerned would be the adoption of the flat-sale method which had been so well tried and successful elsewhere.

A start was made with Colonnade House, Blackheath, a beautiful late Georgian house which had suffered serious damage, not only in the war but from the neglect of many previous owners. The property had to be restored to its original standard of 1802 and this could not possibly be done if capital costs had to be kept down to give a reasonable rental return. The restoration could

only be achieved if individual flat owners contributed their capital. This first experiment produced seven flats which sold on ninety year leases at ground rents of from £15 to £25 per annum with premiums ranging from £1,800 to about £3,000. Nearly £18,000 in sales ensured that this scheduled building was restored to last at least another hundred or more years. Although carried out about nine years ago, only one of the original purchasers has left, this flat selling at a profit to the owner of several hundred pounds. There is no sign of anyone being dissatisfied or wanting to leave. Indeed, the opportunity of living in a property and position they might not otherwise have been able to enjoy seems to be much appreciated.

The flats were purposely sold on a leasehold basis in order that ground rents could be charged at a level which would, in the foreseeable future, compensate either the head lessee or an outside agent in handling the various maintenance items. Detailed scale plans, elevations and site plans were attached to each lease and all owners share every item of maintenance expenditure—gardening, cleaning, insurance, repairs, etc.—in the proportion that their net rating assessment bears to the total of the seven flat assessments.

In theory it might be argued that there will inevitably be friction between the owners. In practice, however, the various owners appear eager to make the arrangement work and so keep up the value of their security. Their attitude to repairs is different. Whereas a flat tenant does not always worry about an overflow or blocked drain, a flat owner acts before serious damage and expense results.

Lest it be thought that the method may be more successful with period properties, it is worth relating the actual results with an ugly suburban Victorian house. This had been converted in 1930 into four flats to produce about £480 gross. Lower rentals had been accepted during the difficult 1938–1939 years and with the increased costs of upkeep, by 1947 the owner, to avoid further loss, was prepared to sell the whole property for the amount of the £2,700 mortgage. Nobody was interested, but the second-floor flat eventually became vacant, and the owner spent about £500 on bringing it up to date. It quickly sold for £2,750 with a lease of seventy odd years at £25 p.a. The mortgagee agreed to accept part repayment only, which enabled the owner to execute much needed repairs with part of the balance of purchase money. In due course all four flats became vacant and sold for a total of £9,700 with ground rents amounting to £93 per annum. The mortgage was duly paid off, and as each flat sale was made a proportion of the purchase price was put back into the building, for

the owner realised it was important not to sell a "repair bill" with each flat. This is most important. A flat should only be bought or sold if the whole building of which it forms part is in a first class state of repair, thus reducing to the minimum any chance of future friction between owners. There may be examples where the poor condition of a flat and the remainder of the building is reflected in the purchase price paid, but it is wise to avoid such propositions for they offer too much opportunity to the unscrupulous speculator.

Depressed to a worthless level by the Rent Acts and rapidly deteriorating, this property was saved from being one of the ever increasing casualties. The owner received a capital return more in sympathy with current values and a ground rent return which will enable an agent to manage the property. Each purchaser acquired a home at about half the sum the same accommodation would have cost to build today, and, most importantly, in the desired position—not at a much greater distance from town.

Subsequently the method was applied to the eighty-four flats formed at The Paragon, Blackheath. It can safely be said that this famous Georgian Crescent could not possibly have been preserved by ordinary financial methods without flat sales contributing to the £260,000 the project has cost to date, and it gives encouragement to those with the problem of period buildings on their hands to know how successful it has been.

The many appreciative flat owners, the smooth working of the varied schemes during the last ten years, the fact that owners are reluctant to sell and that when they do it is, to one's knowledge, never at a loss and usually at a profit, encourages optimism that the method works well for all concerned and is here to stay (*a*).

Freehold Flats (*b*)

It is felt that the practice of selling flats freehold carries with it unnecessary difficulties and dangers. If the freehold interest is retained, there is a better chance of the property being well maintained, and less likelihood of differences between owners if they can appeal to a "focal head." There is a much greater chance of property speculators converting houses to a poor standard and selling freehold at maximum prices, if they know they have no further interest in the security. This also applies to those flats

(*a*) Further particulars of this and other conversions may be found in the author's book *The Conversion of Old Buildings into New Houses*, reviewed *ante*, p. 86.

(*b*) The editors, for obvious reasons, do not agree with all the views expressed in this paragraph: see Vol. 19, p. 3.

sold at nominal annual rentals of a pound or two. These are hardly worth the cost of collection and the suggestion is made that if a ground rent is to be charged it should be high enough to ensure it being worth while to someone to be concerned about the freehold interest. Where the flat concerned may have been subject to the Rent Acts, care must be taken that the total rent charge is less than two-thirds of the net annual rating assessment, otherwise, of course, the purchase price may be returnable and the low ground rent under the long lease become the rent payable in lieu of the standard one.

Building Costs

Whether a conversion is carried out in an inexpensive suburb or an expensive fashionable district there are building costs which are more or less constant.

External Services

A property originally erected for the use of one family cannot be adapted to that of four or six without the drains, gas, water and electricity mains being supplemented or renewed to take the extra demands upon them. It is wise to allow, say, £50 per flat for these, quite apart from the separate service installations to each flat.

Internal Services

The drainage throughout the building proper (as distinct from that in the ground outside) would be included in the approximate kitchen and bathroom amounts. An average kitchen will cost, say, £250. A bathroom with lavatory basin and sanitary closet about £150, including a reasonable amount of partitioning, etc. About £30 per room should be allowed for decorations. Gas points are usually installed by the local board for little or no cost—say £10. Electric installations cost an average of £2 10s. for light and £4 10s. for power points. It is very easy to spend £50–£80 per flat on these. Water systems are included in the kitchen and bathroom figures.

Average Total Cost of Conversion

By the time the inevitable back-log of repairs to the main fabric, boundaries, garden, etc., have been rectified, plus the cost of main hall and staircase repairs, decorations, lighting, carpeting, etc., it is not safe to allow an average of less than about £750–£850 per flat for the most ordinary conversion, with a considerably larger

average for flats attempting better standards. The provision of central heating can cost from £250–£600 per flat, passenger lifts from £1,000–£2,000.

It is quickly possible to move from a £1,250 average per flat to double that amount or even greater, for it must be remembered that building costs are from three to four times those of pre-war.

Conversions for letting can hardly ever justify capital expenditure above the minimum, and it is most unwise to embark upon substantial works to a higher standard unless the public are asked to share the capital cost by purchase of the completed units.

THE PREPARATION AND PRESENTATION OF A RATING APPEAL

By Percy Lamb, m.a., q.c., and
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In a subject so detailed and technical as the law of rating this article can only deal with the matter in general terms. It is intended as some guide to the general law of rating as it has been affected by the recent legislation and to assist the practitioner in his approach to a rating problem particularly with a view to preparing a rating appeal.

No valuation contained in the new valuation lists can be successfully contested unless the proposer or objector or those advising them know the basis on which the valuation was made. The Acts refer to four values—gross value, net annual value, rateable value, and unreduced gross value. So far as hereditaments which are houses or non-industrial buildings are concerned, gross value is the master figure. The net annual value and the rateable value automatically follow as a result of certain standard deductions. So far as most other hereditaments are concerned net annual value is the master figure. There are certain exceptions which will be mentioned later. Net annual value and rateable value are in most cases the same: section 22 (1) (c) of Rating and Valuation Act, 1925. Exceptions to this rule are set out in Part II of the Second Schedule to that Act, as amended by section 137 of the Local Government Act, 1929. There are special rules, as will be seen, relating to industrial hereditaments.

Houses and Non-Industrial Buildings

Dwelling-houses, private garages and private storage premises form a class to which special considerations apply. As they are all hereditaments which are either houses or non-industrial buildings, the gross value has to be found. A dwelling-house is a hereditament used wholly for the purpose of a private dwelling or private dwellings. But if the whole or substantially the whole of the available accommodation in a hereditament is used for letting rooms singly for residential purposes, the hereditament is not to be valued as a dwelling-house. "Available accommodation" means so much of the hereditament in question as is suitable for being used for the

letting of rooms singly for residential purposes. References to the letting of rooms cover lettings by way of a tenancy or of a licence and either with or without board or other services or facilities. Occupancy by a " service tenant ", however, does not prevent the valuation of a hereditament as a dwelling-house. The fact that a hereditament includes a garage, outhouse, garden, yard, court, forecourt or other appurtenance which is not used or not used wholly for the purposes of a private dwelling will not prevent it being valued as a dwelling-house. Furthermore, the fact that part of a hereditament not being a garage, outhouse, garden, yard, court, forecourt or other appurtenance is used partly for the purposes of a private dwelling-house or private dwellings and partly for other purposes will not prevent the hereditament being valued as a dwelling-house unless that part was constructed or has been adapted for those other purposes. A hereditament consisting wholly or mainly of land used as sites for movable dwellings within the meaning of the Public Health Act, 1936, s. 269, is not valued as a dwelling-house. A private garage means a hereditament having a floor space not exceeding 240 square feet and used as a lock-up garage. This definition does not cover hereditaments which form part of the premises in which a business of providing services for motor-vehicles is carried on or which are provided by the keeper of an hotel, inn, guesthouse or boarding-house and used wholly or mainly for the motor-vehicles of his guests or which are used as a garage for a motor-vehicle chargeable with duty under the Vehicles (Excise) Act, 1949, ss. 3, 4 or 5, whether it is used for any other vehicle or not. Private storage premises means a hereditament used wholly in connection with a dwelling-house or dwelling-houses and so used wholly or mainly for the storage or accommodation of any of the following articles belonging to persons residing in that dwelling-house or those dwelling-houses, namely, household stores and other articles of domestic use and light vehicles (that is to say, bicycles, tricycles, perambulators, and other similar vehicles) whether mechanically propelled or not.

Calculation of Gross Value

How is the gross value of hereditaments which are dwelling-houses, private garages and private storage premises found? For the purpose of altering or making the first valuation list made after July 31, 1953, the gross value of these hereditaments will be an amount equal to the rent at which the hereditament in question might reasonably have been expected on or about June 30, 1939, to let from year to year if the tenant had undertaken to pay all the

usual tenant's rates and taxes and if the landlord had undertaken to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent: Valuation for Rating Act, 1953, s. 2 (1) and (2). For the purposes of ascertaining that rent it is assumed that the hereditament was subsisting on or about June 30, 1939, in the state in which it actually subsists at the time of valuation, and that the locality in which the hereditament is situated was on June 30, 1939, in the same state as respects other premises situated in that locality and as respects the occupation and use of those premises and the transport services and other facilities available to persons living or working in the locality and as respects other matters affecting the amenities of the locality as it is at the time of valuation. Any increases in the number of persons using the premises in the locality is disregarded unless that factor affects the amenities of the locality or of a particular hereditament: Valuation for Rating Act, 1953, s. 2 (3) and (4). If the rent of a dwelling-house would be unduly high or low compared with rents for other kinds of dwelling accommodation in the locality or in neighbouring localities by reason of the effect of the Rent Acts or the existence in the locality on June 30, 1939, of a marked scarcity or abundance of dwelling accommodation or of any particular kind of dwelling accommodation, or by reason of both these circumstances, particular care must be taken in making the calculations, because the hypotheses set out in subsections (5) and (6) of section 2 of the Valuation for Rating Act, 1953, to which the reader is referred for full details, apply.

Before the 1953 Act the gross value of hereditaments which were dwelling-houses, private garages and private storage premises had always been found by reference to section 68 of the Rating and Valuation Act, 1925 (for hereditaments outside London), and section 4 of the Valuation (Metropolis) Act, 1869 (for hereditaments inside London). Gross value outside London means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and if the landlord undertook to bear the cost of the repairs and insurance, and other expenses, if any, necessary to maintain the hereditament in a state to command that rent. Gross value inside London means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament, if the tenant undertook to pay all the usual tenant's rates and taxes, if any, and if the landlord undertook to bear the cost of the repairs, insurance, and other expenses, if any, necessary to maintain the hereditament in a state to command that rent. These gross values must still be found, because under section 2 (1)

of the Valuation for Rating Act, 1953, when it is found that a valuation made under the 1953 Act exceeds the gross value of the hereditament ascertained by reference to the definition of gross value in the 1925 or 1869 Acts, the hereditament will be valued with reference to those Acts and not in accordance with the provisions of the 1953 Act. Furthermore, it is necessary to find the gross value under the 1925 and 1869 Acts for the purpose of ascertaining what the 1953 Act calls the "unreduced gross value." This is a new term and is only used in relation to hereditaments consisting partly of premises used wholly for the purpose of a private dwelling or dwellings and partly of premises not so used; *e.g.*, a shop with a residential flat above it. "Unreduced gross value" means the gross value of such a hereditament as defined in either the 1925 or 1869 Acts without reference to the provisions of the 1953 Act. Under section 4 of the 1953 Act the gross value of such a hereditament, provided that not less than one-tenth of the unreduced gross value is attributable to the premises used wholly for the purposes of a private dwelling or private dwellings, is to be ascertained for the purpose of making the first valuation list after July 31, 1953, as follows:

(a) by calculating the amount which represents the proportion of the unreduced gross value which is attributable to that part of the hereditament which is used wholly for the purpose of a private dwelling or private dwellings, and (b) by calculating the amount which would represent the proportion of the gross value of the hereditament so attributable if the gross value fell to be ascertained in accordance with section 2 of the 1953 Act; and if (a) exceeds (b) the gross value is to be the unreduced gross value reduced by the difference between those amounts. Thus five calculations are necessary:

(i) the gross value of the whole on the basis of the definition of gross value in the 1925 and 1869 Acts (defined as unreduced gross value);

(ii) the apportioned value of residential and non-residential parts on this basis;

(iii) the gross value of the whole ascertained in accordance with section 2 of the 1953 Act;

(iv) the apportioned value of the residential and non-residential parts on this basis;

(v) if that amount of the unreduced gross value attributable to the residential part exceeds the 1953 gross value attributable to the residential part, the difference is subtracted from the unreduced gross value of the whole, giving the new gross value of the whole.

If these calculations seem complicated in the abstract, the position becomes clear when they are shown operating in practice:—

House and shop, unreduced gross value Whole £600.
" " " unreduced gross value House £200.
" " " unreduced gross value Shop £400.
" " " 1953 Act gross value (*i.e.*, 1939 values) Whole £400.
" " " 1953 Act gross value (*i.e.*, 1939 values) House £100.
" " " 1953 Act gross value (*i.e.*, 1939 values) Shop £300.

The gross value of the whole will be the unreduced gross value of the whole (£600) less the difference between the unreduced gross value and the 1953 gross value of the house (£200 – £100 = £100)— equals £500. There are, however, certain types of hereditament which are excluded from the operation of this rule by section 4 (4) of the 1953 Act, as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, 8th Schedule, Part II.

Gross value as defined by the 1925 and 1869 Acts is still the master figure so far as concerns hereditaments which consist of one or more houses (as opposed to dwelling-houses) or other non-industrial buildings (as defined by section 22 (4) of the 1925 Act, which subsection was added by section 5 (3) of the 1955 Act) with or without any garden, yard, court, forecourt, outhouse or other appurtenance belonging thereto but without land. It will be noted that under this category come such important hereditaments as shops and cinemas.

Calculation of Net Annual Value and Rateable Value

In all cases where gross value is the master figure certain standard deductions are made (as specified in the table contained in Part I of the Second Schedule to the 1925 Act, as amended by section 5 (4) of the 1955 Act) from the gross value to give the net annual value. Unless the hereditament belongs to one of the classes referred to in section 22 (1) (c) of the 1925 Act the rateable value is the same as the net annual value.

Other Hereditaments

Ascertainment of Net Annual Value

Net annual value is the master figure for most other hereditaments. For the purposes of ascertaining the net annual value there shall be estimated the rent at which the hereditament might

normally be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge, if any, and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent, and the annual rent as so estimated shall be taken to be the net annual value of the hereditament. As has been stated above, the net annual value is usually the same as the rateable value.

Industrial Hereditaments

Special considerations apply to industrial hereditaments. An industrial hereditament (as defined by the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1)) is a hereditament, not being a freight transport hereditament, occupied and used as a mine or mineral railway or as a factory or workshop (as defined by the Factory and Workshop Act, 1901, s. 149 and Schedule 6). If a factory or workshop is primarily occupied and used for any of the purposes or for any combination of the purposes set out in section 3 (1) of the 1928 Act, then it is not an industrial hereditament (see *Sedgwick* v. *Watney & Co.* [1931] A.C. 447). In the case of an industrial hereditament shown in the valuation list as being occupied and used wholly for industrial purposes the rateable value shall be taken to be one-quarter of the net annual value: section 68 (1) (a) of Local Government Act, 1929. In the case of an industrial hereditament shown in the valuation list as being occupied and used partly for industrial purposes and partly for other purposes, the rateable value of the hereditament shall be taken to be an amount equal to one-quarter of the net annual value shown in the list as apportioned to the occupation and user for industrial purposes, together with the whole of the net annual value so shown as apportioned to the occupation of the hereditament for other purposes: section 68 (1) (b) of Local Government Act, 1929, *e.g.*:

N. A. V. £1,200, Industrial £1,200, R. V. £300.
N. A. V. £1,200, Industrial £800, Non-industrial £400, R. V. £600.

Public Utility Undertakings

The valuation of public utility undertakings presents special problems. The problems arise from the endeavour to ascertain the rental value of that which in fact is never let. Thus, a rule has been evolved whereby public utility undertakings are rated on what is called the "profits basis" unless there are some special circumstances which render that method impossible of application.

From the gross receipts of the undertaking for the last complete year's trading prior to the date of the valuation certain deductions are made. The rent which a tenant would be willing to pay is treated as the rateable value of the undertaking. This is a very specialised branch of rating and should be dealt with by experienced rating surveyors. Special considerations apply to Electricity undertakings as a result of the Local Government Act, 1948, and the rating of Gas Boards is dealt with by the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Determination of Rental Value

Where the rental value, whether it represents the gross value or the net annual value or the unreduced gross value as defined by the various Acts, is to be determined, various matters have to be taken into consideration. Of course, it depends to a very large extent on the nature of the hereditament as to which of the following matters are applicable. The tenant described by the statutes is a "hypothetical tenant." The hypothetical tenant pays a hypothetical rent. It must be assumed that the premises are vacant and to let. The question then to be answered is what rent, taking into account the various conditions referred to in the different Acts, might reasonably be expected to be obtained for the premises? The fact that the premises are let at an actual rent is no criterion unless all the actual conditions are the same as the conditions mentioned in the statutes. The owner or the actual occupier are always to be considered as possible tenants. For the purpose of ascertaining the rent it is assumed that the imaginary tenant has some security of tenure. "The hypothetical tenant is assumed to be a tenant from year to year with a reasonable prospect of continuing in occupation": *per* Lord Maugham in *Townley Mill* v. *Oldham A. C.* [1937] A.C. at p. 437. On the basis that the rent is as hypothetical as the tenant the fact that the amount of rent recoverable from the occupation of the hereditament is restricted by statute is immaterial. "It may be observed that the phrase is 'might be expected to pay'; it does not go on to say 'and the landlord might be able to exact'": *per* Lord Sumner in *Poplar A. C.* v. *Roberts* [1922] 2 A.C. at p. 116. Although the tenant and the rent are hypothetical the conditions in which the rent is to be determined are not. The actual conditions affecting a hereditament at the time of valuation are taken into consideration. "The hypothetical rent which the tenant would give is estimated with reference to the hereditament in its actual physical condition (*rebus sic stantibus*) and a continuance

of the existing state of things is prima facie to be presumed": *per* Lord Maugham in *Townley* case, *supra*, at p. 437.

Effect of Profit on Rateable Value

Although rent and not profit is the measure of rateable value, the rateable value is not unaffected by the existence of profit arising out of occupation. Rateable value is ascertainable if a tenant will give a rent irrespective of whether a profit be made from occupation or not. Profits themselves are not rated "but if the motive or object of the tenant, who is most likely to take the premises, is to make a profit, the amount of the profit which he is likely to make may very materially affect the rent which the tenant would be willing to give": *per* Atkinson J. in *Aberaman Ex-Serviceman's Club and Institute* v. *Aberdare N. D. C.* [1948] 1 K.B. at p. 337. Profit is considered to find out what the hypothetical tenant is likely to give in order to have the opportunity of making that profit. However, the skill and judgment of the tenant are not rated. Therefore, where profits depend on the skill and judgment of the tenant and not on the characteristics of the hereditament they are not a matter affecting the rental value. But if as a result of certain characteristics appertaining to the hereditament profits can be earned there by any ordinary tenant, the expected profit will affect the rent. To this extent profits actually made on the premises are an element for consideration. "If the law has prevented the hereditament being profitable at all, then the occupation is of no value; and if the law has restricted its profit-earning capacity then the effect of such restriction will tend to diminish its value": *per* Lord Birkenhead in *P. L. A.* v. *Orsett Union* [1920] A.C. at p. 284. But if the property produces a profit and its profit-earning capacity is not impaired, the fact that the profits earned may be diverted from the actual occupier by private agreement or as a result of some statutory rule is immaterial.

Evidence of Value

What matters will help practitioners, tribunals and the courts in assessing what rent the hypothetical tenant will pay? What evidence can be adduced which will affect the assessment of the rental value? Of course, the best evidence of the value of a commodity is what happens in the market. If all the conditions required by the statutes obtain with regard to a particular hereditament then the rent which that hereditament commands in the market will be the rental value of the hereditament. But it is in the highest degree unlikely that all the required conditions exist.

Even where the required conditions apparently exist it may be that the rent has not been fixed by the " higgling of the market " but may be the result of considerations personal and peculiar to the particular landlord and the particular tenant. It has been found that where an analysis of recent rents of a class of hereditaments has been made such rents show a much higher level of value than could be applied to all hereditaments of that class. Thus, as a source of ideal evidence for ascertaining rental values the market must be approached with great care and circumspection. The difficulty is simply that the conditions required by the statutes do not generally obtain in the market. " If the subject is an ordinary one similar in character to other subjects which have stood the test of markets or, better still, if it has stood the test of the market itself without disturbing circumstances, the inquiry is simple. But when the nature and circumstances of the hereditament in question do not admit of such a test some other way must be found ": *per* Lord Dunedin in *P. L. A.* v. *Orsett Union*, *supra*, at p. 295. Of course, the observations on the values obtaining in the market apply similarly to the values obtaining in the market in respect of hereditaments comparable in character to the hereditament to be rated. Where a valuation has been made of comparable hereditaments and a rateable value has been published or a proposal to alter a valuation in the valuation list has been successful in respect of comparable property then that rateable value is evidence which may be useful in arriving at or disputing the rateable value of the hereditament to be rated. Consequently investigation should be made of the rateable value of any property reasonably comparable to the hereditament in respect of which a rating appeal is being considered. There are some premises not capable of being valued by comparison with other similar premises or by reference to any market values because similar premises do not exist. In these cases " the proposed tenant and the landlord would alike be thrown back on to a question of amount of possible profits to flow from the occupation ": *per* Wrottesley J. in *Racecourse Betting Control Board* v. *Brighton Corporation* [1941] 2 K.B. at p. 296, cited with approval by Lord Goddard in *Surrey C. V. C.* v. *Chessington Zoo, Ltd.* [1950] 1 K.B. at p. 651. In such cases the rent will depend on the amount of the gross receipts reduced by the various permitted deductions and may become a matter of ascertaining the quantum of the various deductible figures. If a practitioner is preparing evidence which involves examination of market conditions or comparable values he would be well advised to work in conjunction with a qualified surveyor experienced in dealing with

rating valuations. His knowledge of comparables and the conditions prevailing in the market can be of inestimable value. It will be appreciated that such knowledge is specialised and such evidence can frequently only be adduced through an expert witness.

Valuation Returns

There are now certain statutory rules relating to returns made for the purpose of compiling valuation lists both in and out of London: section 3 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. These returns are evidence of the facts stated therein in any valuation proceedings. Any document purporting to be a return to which section 3 of the 1955 Act applies is, until the contrary is shown, presumed to be (a) such a return (b) to have been made by the person by whom it purports to have been made (c) in the capacity, if any, specified in the return. These returns, however, can only be used in certain circumstances. The valuation officer can only use returns if he gives fourteen days' notice to the parties to the proceedings of the documents he proposes to use and of the hereditaments to which they relate. The parties must be given the opportunity, if not less than twenty-four hours' notice of such a desire is given, of inspecting and taking extracts from the returns. Furthermore, any person receiving the notice may also give notice to the valuation officer of the hereditaments that person considers comparable in character or otherwise relevant to his case and may require the valuation officer to permit him to inspect and take extracts from all those returns relating to those other hereditaments as are in the possession of the valuation officer. The valuation officer may be required to produce these returns where he has been informed that such production is desired. However, the number of hereditaments specified by a party to any valuation proceedings in his notice to the valuation officer for inspection and production must not exceed the number of hereditaments specified by the valuation officer in his original notice of intention to rely on such returns. If a valuation officer fails or refuses to comply with the notice he may be compelled to do so by the court or tribunal before which the proceedings are to be brought provided that the court or tribunal consider that it is reasonable to direct the valuation officer to comply with the notice. There is a right of appeal on this matter to the Lands Tribunal from a decision of a Local Valuation Court.

HEREDITAMENTS RELIEVED FROM RATES

It should be noted that certain hereditaments are relieved from rates and others are given substantial deductions in the amount

of rates otherwise payable. From and after the date when the first new valuation list comes into force, *i.e.*, April 1, 1956, places of public religious worship which belong to the Church of England or to the Church of Wales or which are for the time being certified as required by law as places of religious worship, any church hall, chapel hall or similar building used in connection with any such place of public religious worship and so used for the purposes of the organisation for the conduct of religious worship in that place, shall not be liable to be rated. Church halls had hitherto, in many cases, been the subject of sympathetic or nominal assessment without express statutory authority. There are provisions for rating church halls and similar buildings where they are let or licensed for use otherwise than for the purposes mentioned in section 7 of the 1955 Act. Where the average annual account of the payments accruing due in consideration of such lettings exceeds the average annual amount of the expenses attributable to those lettings the gross value is to be assessed only by reference to the amount of the excess. The following hereditaments have been given some relief under section 8 of the 1955 Act: (a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; (b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field. These three classes of hereditaments have hitherto been the subject of sympathetic or nominal assessments. The effect of the section, subject to the provisions of the Fifth Schedule of the 1955 Act, is that the rates payable on these hereditaments for the first year of the new valuation list must not exceed the rates payable for the last year of the old list. This usually means that the rates payable are lower than they would be apart from section 8 and a proportionate reduction must be given in subsequent years unless the rating authority have given at least three years' notice of any modification or discontinuance of the reduction. The rating authority are also given power to reduce or remit rates payable in respect of these hereditaments. Section 9 gives certain other reliefs for the details of which the reader is referred to the Act.

Appeals Against the Valuation

How and by whom is the valuation contested? Any person who is aggrieved

(a) by the inclusion of any hereditament in the valuation list, or

(b) by any value ascribed in the list to a hereditament or by any other statement made or omitted to be made in the list with respect to a hereditament, or

(c) in the case of a building or portion of a building occupied in parts, by the valuation in the list of that building or portion of a building as a single hereditament, may at any time make a proposal for the alteration of the list so far as it relates to that hereditament. "'A person aggrieved' is a person who will have a *locus standi* before the court when the case comes on and who thinks that he can or may be able to support a case": *per* Lord Goddard in *R.* v. *Exeter A. C.* [1948] 112 J.P. at p. 457. The valuation officer may, of course, make a proposal for any alteration of a valuation list. Similarly the rating authority may make such a proposal. Where it appears to a rating authority that a hereditament in their area which is not included in the list ought to be included and the valuation officer gives notice in writing that he does not intend to make a proposal for inserting that hereditament in the list, the rating authority at any time within twenty-eight days after the date on which that notice was given may make a proposal for the alteration of the list by the insertion of that hereditament. The form of proposal is prescribed by the Valuation Lists (Form of Proposal for Alteration) Regulation, 1955 (S.I. 1955, No. 1761). A proposal may include any number of hereditaments even if they are separately assessed provided the maker of the proposal has a right to do so in respect of all the hereditaments so included. A proposal must always be served on the valuation officer unless, of course, it is made by him. The material date for considering the merits of a proposal is the date when it is made: *Barratt* v. *Gravesend A. C.* [1941] 2 K.B. 107. Any person aggrieved by a valuation contained in the new valuation lists which are to come into force on April 1, 1956, need not make any proposal for five months after that date. It has been said in the House of Commons that this period is one for negotiation during which the matter may be amicably settled. If, after a formal proposal has been made, and no notice of objection has been served or every such notice has been unconditionally withdrawn and the valuation officer is satisfied that the proposal is well founded he is to cause that alteration to be made in the list. The matter can still be dealt

with by agreement where a proposal has been made and any person who has been served with the proposal has given notice of objection which he has not unconditionally withdrawn. For this purpose the agreement of the following persons is requisite, namely (a) the valuation officer, (b) the person who made the proposal, where the proposal was not made by the valuation officer, (c) any person who has served, and has not unconditionally withdrawn, a notice of objection to the proposal, (d) the occupier of the hereditament to which the proposal relates, if he is not included by virtue of either of the last two preceding paragraphs, (e) the rating authority (if not included by virtue of any of the preceding paragraphs), unless they have notified the valuation officer that they do not desire to be included by virtue of the provisions of the Act either generally or as respects a class of hereditaments which includes the hereditament to which the proposal relates. The same parties may, if they wish, agree to refer the matters in dispute to arbitration in which case the provisions of the Arbitration Act, 1950, will apply.

Grounds for Alteration

Every proposal must specify the grounds on which the proposed alteration is supported. There have been numerous decisions relating to the particularity with which the grounds of a proposal must be stated. It is submitted that the true position is as set out by Scott L.J. in *R.* v. *Winchester Area Assessment Committee, ex p. Wright* [1948] 2 All E.R. 552. "The proposal must give sufficient information to enable the assessment committee (now, of course, the Local Valuation Court) to know (1) whether an increase or a decrease is asked for; (2) to which of the existing valuations in the valuation list the proposal refers; (3) what is the ground of complaint as to the existing valuation on that point." A proposer is not required to set out the points which he may wish to make in support of his grounds or the evidence which he will call in the event of an appeal: *Neath Steel Sheet and Galvanising Co.* v. *Neath Assessment Committee* (1943) 36 R. & I.T. 50. Some doubt exists as to whether the specific alteration proposed is required to be stated in the proposal. The precedent in the Schedule to the Valuation Lists (Form of Proposal for Alteration) Regulations, 1955 (S.I. No. 1761) contains the paragraph heading "The alteration proposed is: . . ." Whether or not the proposer is required to specify the extent of the reduction desired it is always wise to do so for where a proposal is made on the ground that the assessment of a hereditament is "excessive and ought

to be reduced" and no specific figure is proposed it is open to the valuation officer to refrain from making an objection and then to make a nominal reduction. This might be unsatisfactory to the ratepayer but he would not be able to appeal and would have to start again with a new proposal. Similarly where a valuation officer makes a proposal without specifying the amount of the alteration the ratepayer should always give notice of objection even where he considers that there is ground for the proposal, for it is open to the valuation officer if there is no notice of objection to effect an alteration which may be far greater than the ratepayer anticipates.

Procedure

The details of proceedings on proposals are contained in section 41 of the Local Government Act, 1948, as amended by the First Schedule to the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The valuation officer has to send a copy of the proposal to the occupier, and to the rating authority, within twenty-eight days after the date on which the proposal was served on him, or within seven days after the date on which the proposal was made if he made the proposal. The owner or occupier of the whole or of any part of the hereditament to which a proposal relates, or the rating authority, may, within twenty-eight days from the date on which the notice of the proposal is served, serve on the valuation officer notice in writing of objection to the proposal. The valuation officer must transmit a copy of any objection to a proposal to the maker of the proposal within twenty-eight days of the date on which the notice of objection is served on him. The valuation officer also has to transmit copies of every proposal and objection to the clerk of the appropriate local valuation panel within a period not exceeding six months from "the relevant date," that is to say in the case of a proposal made by him, the date of the proposal, and in the case of any other proposal, the date on which it was served on him. If no notice of objection is served within the specified time or every notice is unconditionally withdrawn and if the proposal was made by the valuation officer or he considers it well founded, the list is to be altered to give effect to the proposal. If the proposal was made otherwise than by the valuation officer he may at any time within the period of five months beginning with "the relevant date" give notice in writing to the person who made the proposal that he objects to the proposal and that the proposer if he does not withdraw the proposal within fourteen days will be treated as intending to appeal against the valuation officer's objection to the proposal. If the

proposal is not so withdrawn the valuation officer has to transmit a copy of the proposal, and of the notice, and of any objection to the proposal which has not been unconditionally withdrawn, to the clerk of the appropriate local valuation panel and he must do this not less than fourteen nor more than twenty-eight days after he gave the notice. If at the end of a period of six months beginning with " the relevant date " the valuation officer has given no notice to the proposer that he will be treated as intending to appeal against the valuation officer's objection to the proposal, and no notice of objection has been served, or such notice has been unconditionally withdrawn, the valuation officer is to be taken to be satisfied that the proposal is well founded and is to alter the list accordingly. It is the valuation officer's duty to notify the person who made the proposal, the objectors, and the rating authority if, and when, he sends a copy of a proposal to the clerk to the local valuation panel. The transmission of a copy of a proposal to the clerk has the effect of an appeal to a local valuation court by the person who made the proposal against every objection whether of the valuation officer or of any other person signified by a notice of which a copy is transmitted with the copy of the proposal.

Preparation and Conduct of an Appeal

An appeal to a valuation court, no less than any other form of litigation, must be carefully prepared. After hearing the persons entitled and desiring to be heard, the court is to give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded: section 48 (4), Local Government Act, 1948. The burden of proof, then, is on the appellant, and if he fails to discharge his burden the court can make no alteration. The appellant will have to prove any documents relating to the hereditament which is the subject of the appeal. For example, a plan showing the measurements of the hereditament will have to be proved by the maker of the plan. In such cases where the facts which the plan illustrates are not likely to be in dispute it should, if possible, be agreed by the parties prior to the hearing. When preparing for the hearing before a Local Valuation Court or before the Lands Tribunal it is advisable to provide at court six copies of every relevant document each with its own distinctive title (*e.g.*, FBC 1, using the initials of the witness who will produce it) in order that all the members of the

court or tribunal and the representatives of the opponent parties may have a copy before them. Much time and many misunderstandings have been avoided by following this simple though often forgotten administrative procedure. When the document consists of a valuation of the hereditament under appeal and it is intended to refer to hereditaments said to be comparable, it is wise to put all the valuations on one sheet of paper so that the reader can readily follow the appellant's evidence and avoid either taking a note or referring from one document to another and thereby losing the thread of the evidence of the witness. Where the ground of a proposal is that a hereditament is over-assessed it is legitimate to make comparisons with the valuations of comparable properties with a view to proving over-assessment. These other valuations are in the nature of admissions by the authority responsible for them: *Pointer* v. *Norwich Assessment Committee* [1922] 2 K.B. 471. The contents of a valuation list or an extract from any such list may be proved by the production of a copy of the list or of the relevant part of the list purporting to be certified by the clerk of the rating authority to be a true copy. Where it is intended to adduce evidence of market values or comparables it will usually be necessary to call an expert surveyor with personal knowledge. For this purpose a surveyor who has an intimate knowledge of the locality in which the hereditament under dispute is situate will usually be able to give the most valuable evidence. Where a hereditament is valued on the "profits basis" and certain deductions are made from the total of gross receipts the relevant figures will, of course, have to be proved by someone who has personal knowledge of those figures and the way in which they are arrived at. Similarly where profits are an element for consideration the relevant figures will have to be proved. It may be necessary in some cases for someone, usually the occupier, to give evidence of the particular facilities the hereditament offers. General provisions as to inspection of documents are contained in section 60 of the 1925 Act, which is applied to London by section 61 (2) of the Local Government Act, 1948. The right of inspection extends to any draft list, any valuation list, notices of appeal, notices of objection, proposals, any rate book, and minutes of the proceedings of any rating authority and of any valuation court. Copies and extracts may be taken. The right of inspection is not confined to ratepayers in the rating area to which the list or other document relates. Any ratepayer has the same right and so has any occupier who pays his landlord rent inclusive of rates. Any person who has the right to inspect may do so through an authorised agent.

Proceedings in Local Valuation Courts

At the hearing of an appeal to a Local Valuation Court (a) the appellant; and (b) the valuation officer, when he is not the appellant; and (c) the owner or occupier of the hereditament to which the appeal relates, when he is not the appellant; and (d) the rating authority for the area in which the hereditament in question is situated, when that authority is not the appellant; and (e) the objector where he is not one of the persons mentioned in (a), (b), (c) and (d), are entitled to appear and be heard as parties to the appeal and to examine any witness before the court and to call witnesses. The proceedings in most Local Valuation Courts are somewhat informal but the court may administer oaths for the purpose of taking evidence on oath. The court must sit in public unless under special circumstances it orders otherwise. Appearance may be personal or by counsel or by solicitor or by any other representative. The rating authority may appear by counsel or solicitor or by their clerk or other officer duly appointed for the purpose. The appellant is entitled to begin and the other parties to the appeal are heard in such order as the court may determine. The decision of the court is that of the majority. At least fourteen days' notice of the date, time and place of the hearing must be given to the appellant and to every person who has served a notice of objection in respect of the hereditament. The Clerk to the Local Valuation Panel must advertise the date, time and place of the hearing.

Appeals to the Lands Tribunal

Any person who is aggrieved by the decision of a Local Valuation Court may appeal to the Lands Tribunal. It must be noted that it is essential first, that an appeal relating to the hereditament which it is desired should be the subject-matter of an appeal to the Lands Tribunal should have been brought to the Local Valuation Court and there decided, and second, that the appellant should have appeared either in person or by a representative before the valuation court on its hearing of the appeal. Notice of appeal must be given in writing substantially in the form set out in Form 3 in the First Schedule to the Lands Tribunal Rules, 1949, within twenty-one days of the decision of the Local Valuation Court. The form requires him to state *inter alia* whether he proposes to call an expert witness to give evidence in support of the valuations on which he will rely and he must set out the grounds of the appeal with no greater particularity than is required in the case of an appeal to the Local Valuation Court. With the notice must be sent a copy of the decision of the Local Valuation Court

together with a list of the names and addresses of the persons who appeared as parties to the proceedings before the Valuation Court and also sufficient number of copies of the notice of appeal for service upon each of those parties and, if he was not a party to the proceedings in the Valuation Court, the valuation officer. The registrar of the Lands Tribunal will then serve a copy of the notice of appeal on all those parties. Every party upon whom a copy is so served must if he intends to appear give written notice of that intention to the registrar and to the appellant within twenty-one days from the date of service by the registrar. The notice must state (a) whether he intends to appear separately or jointly with some other person; (b) the grounds on which he intends to rely; (c) whether he does or does not propose to call an expert witness to give evidence in support of any valuation; (d) an address at which documents may be served upon him. There is a special rule in cases where the net annual value of the hereditament, as it appears in the valuation list, to which the appeal relates exceeds £200 and notice of intention to appeal has been given to the appellant or where the appeal is on a point of law. The appellant must send to the registrar of the Tribunal and to each party who has given notice of intention to appear, within twenty-one days after the time limited for giving notice of intention to appear, a Statement of his case including the facts to be proved and the points of law (if any) upon which he intends to rely at the hearing. Similarly, any party who intends to appear in opposition to the appeal must send, within twenty-eight days after receiving the appellant's Statement, to the registrar and to the appellant a Reply stating his case. With the Statement and the Reply must be sent a valuation of the hereditament including particulars and computations in support of such valuation and a description of any comparable hereditament to which the appellant or the party replying intends to refer at the hearing in support of his case. This must be carefully noted, for, if at the hearing any party seeks to rely on any valuation or other document which appears to the tribunal not to have been sent to the registrar, it must, unless it is satisfied that no prejudice to any other party will arise, adjourn the hearing on such terms as to costs or otherwise as it thinks fit. The hearing of rating appeals before the tribunal is always in public except where the tribunal is acting as arbitrator under a reference pursuant to section 1 (5) of the Lands Tribunal Act, 1949, by consent of the necessary parties as referred to above. It should be remembered that this power may be a convenient one in cases where all the parties required to give their consent intend from the beginning to take the case before the tribunal for it saves both

the time and expense of a hearing before the Local Valuation Court. The appellant in an appeal from the Local Valuation Court is entitled to begin and other parties are heard in such order as the tribunal may determine. Any party may appear and be heard either in person, or by counsel or solicitor, or by any other person allowed by leave of the tribunal (or by leave of the President or the registrar in the case of an interlocutory application) to appear instead of any party.

Appeals to the Court of Appeal

A decision of the Lands Tribunal is final, but any person aggrieved by the decision as being erroneous in point of law may require the tribunal to state and sign a case for the decision of the Court of Appeal. The request to the tribunal to state a case must be made within six weeks of the date of the decision in writing addressed to the registrar of the tribunal. The person aggrieved must lodge the case with the Court of Appeal within twenty-one days after receiving it together with a notice of motion stating the grounds on which the decision is alleged to be erroneous in point of law. The notice of motion must be served on the registrar of the tribunal and the appellant must also serve it and a copy of the case stated on every party to the proceedings before the tribunal at least twenty-one days before the date named in the notice for making the motion. At the hearing the Court of Appeal has power to amend the case or order it to be sent back to the tribunal for amendment and may draw inferences of fact from the facts set forth in the case. The address of the Registrar of the Lands Tribunal is 24, Abingdon Street, London, S.W.1.

Costs

The Local Valuation Courts are given no power to award costs. The Lands Tribunal has a discretionary power to order that the costs of and incidental to any proceedings before it incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid under an order or direct in what manner they are to be taxed. If the tribunal directs that the costs of a party to the proceedings shall be paid by the other party, it may settle the amount of the costs by fixing a lump sum, or it may direct that the costs shall be taxed on a specified scale of the scales of cost prescribed by the Rules of the Supreme Court or by the County Court Rules, as the case may be. There are provisions for a dissatisfied party to apply to the President to review the registrar's taxation.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Attorney-General v. *Parsons* [1956] 2 W.L.R. 153; [1956] 1 All E.R. 65 (H.L.)

Mortmain—short lease assigned to foreign company—whether automatic forfeiture to Crown—Mortmain and Charitable Uses Acts, 1888 *and* 1891—*Land Registration Act,* 1925.—The House of Lords by a majority (Earl Jowitt, Lord Porter, Lord MacDermott and Lord Cohen, Lord Morton of Henryton dissenting) reversed the decision of the Court of Appeal (noted *ante,* Vol. 19, p. 306, where the facts are given) and thereby also disapproved *Morelle, Ltd.* v. *Waterworth* [1955] 1 Q.B. 1 (Vol. 18, p. 420) and *Morelle, Ltd.* v. *Wakeling* [1955] 2 Q.B. 79 (Vol. 19, pp. 190, 223). Nevertheless, much of the reasoning of the Court of Appeal in the three cases was approved.

The House considered three points: (i) whether the Mortmain and Charitable Uses Acts, 1888 and 1891, applied to short leases or the assignment of the short residue of a term (ii) if so, whether forfeiture to the Crown was automatic or depended on entry and (iii) whether the registration of a foreign company, without authority to hold land, as registered proprietor under the Land Registration Act, 1925, affected the issue.

On the first point Earl Jowitt and Lord Porter expressed no opinion. Lords Morton, Cohen and MacDermott held that the registered transfer was an " assurance of land " because the definition of " assurance " (1888 Act, s. 10 (1)) mentioned both a lease and a transfer, while the definition of land as " tenements and hereditaments, corporeal or incorporeal, of any tenure " (1888 Act, s. 10 (iii) as amended by 1891 Act, s. 3) was apt in the nineteenth century to include leaseholds. Lords Morton and Cohen also held that the assurance was " in mortmain," regarding the definitions in the two Acts as sufficient to alter the earlier law whereby the Statute de Viris Religiosis, 1279, did not apply to short leases. Lord MacDermott, however, thought the Mortmain Acts inapplicable to short terms, which must on any definition include " the fag-end of a lease which has less than five years to run " ([1956] 2 W.L.R. at p. 171; [1956] 1 All E.R. at p. 79). Whether there is here a decision binding the House in future cases appears to be an undecided point in the law of judicial precedent; it could be relevant if in future the Chief Land Registrar refuses (as he presumably must in view of the decisions of the Court of Appeal) to register a transfer to a foreign company without authority to hold land.

The second point turned on the construction of the words " the land shall be forfeited to Her Majesty from the date of the assurance and Her Majesty may enter on and hold the land accordingly " (1888 Act, s. 1 (1)). All members of the House agreed that only the leasehold interest was in question. Lord Morton, dissenting, said these words were " unambiguous; indeed, if the legislature desired to enact that an assurance which came within the section was to bring about an immediate forfeiture, I find it difficult to imagine words more apt for the purpose " ([1956] 2 W.L.R. at pp. 165, 166; [1956] 1 All E.R. at pp. 74, 75). The other members of the House, however, finding the subsection ambiguous and so taking into account the circumstances in which the statute was passed (see Maxwell on *Interpretation of Statutes,* 10th ed., pp. 3–25), held that " forfeited " in the subsection meant " liable to be forfeited." As a result there was no automatic forfeiture to the Crown. This decision was based on the earlier law, which required entry, the short title of the statute (an act to " consolidate and amend ") and the fact that the alternative conclusion would make the Crown " an open receptacle for all such interests as might be created or transferred in breach of the statute " (*per* Lord MacDermott [1956] 2 W.L.R. at p. 173; [1956] 1 All E.R. at p. 80).

Only Earl Jowitt and Lord Morton considered the Land Registration Act, 1925. Earl Jowitt, without expressing any final opinion, was inclined to think the register conclusive unless and until rectified but Lord Morton agreed with the decision of the Court of Appeal in *Morelle* v. *Wakeling, Ltd., supra.* That decision, received with some regret in this journal (*ante,* Vol. 19, pp. 190, 223), therefore stands undiminished.

The Crown is therefore relieved of the involuntary acquisition of onerous property, but landlords, especially those outside the areas of registration of title, will view the position with less satisfaction. The community as a whole may suffer if leaseholds or any other interests in land are freely transferred to foreign companies not readily amenable to process of law (see *per* Denning L.J. in *Morelle, Ltd.* v. *Waterworth* [1955] 1 Q.B. 1 at p. 12). So long as the only remedy is that provided by the Mortmain and Charitable Uses Act, 1888, it is hardly sufficient for the Crown to abdicate its responsibilities under that statute. As regards the law of real property and conveyancing these cases may prove no more than a passing flurry in mortmain, but they will constitute a permanent and major contribution to the law concerning judicial precedent and interpretation of statutes.

Miller v. *Emcer Products, Ltd.* [1956] 2 W.L.R. 267; [1956] 1 All E.R. 237 (C.A.)

Easement—shared use of lavatory—validity.—This case was concerned primarily with the landlord's covenant for quiet enjoyment. It is only noted here because the Court of Appeal (Evershed M.R., Birkett and Romer L.JJ.) held that the express grant of the right to use a lavatory in common with the landlord and others created a

valid legal easement, following *Heywood* v. *Mallelieu* (1885) 25 Ch.D. 357 (use of kitchen); the court regarded the temporary exclusion of the grantor involved in the easement as irrelevant, distinguishing *Copeland* v. *Greenhalf* [1952] Ch. 452. The decision confirms the view expressed in the note on *Re Ellenborough Park* [1955] 3 W.L.R. 892; [1955] 3 All E.R. 667 (*ante*, p. 62) that sharing rights will now readily subsist as easements rather than licences, so that landlords who make informal arrangements with tenants must beware of the rules of implied grant if a fresh lease is made. Incidentally, *Re Ellenborough Park, supra,* though decided by the same members of the Court of Appeal, does not seem to have been mentioned in the instant case.

(See also p. 170, *post*)

British Transport Commission v. *Westmorland County Council*; *British Transport Commission* v. *Worcestershire County Council* [1956] 2 W.L.R. 428; [1956] 1 All E.R. 321 (Div.Ct.)

Public right of way—dedication—powers of statutory body—compatibility with purposes of acquisition—Railway Clauses Consolidation Act, 1845, *s.* 16—*National Parks and Access to the Countryside Act,* 1949, *s.* 31.—These two cases, which were dealt with together, and *Fairey* v. *Southampton County Council,* noted *infra,* were appeals by way of case stated from decisions of quarter sessions refusing declarations that there were no public rights of way over the applicant's land, as shown on provisional maps prepared by the respondents. (National Parks and Access to the Countryside Act, 1949, ss. 28–30, and as to appeals, s. 31.)

The facts in each case established dedication if the British Transport Commission and its predecessors had power to dedicate. The Divisional Court (Lord Goddard C.J., Stable and Ashworth JJ.) affirmed the principle that a statutory body "can grant an easement of way or dedicate a path to public use over its land, provided that the grant or dedication is not inconsistent with the statutory purposes for which it was acquired" ([1956] 2 W.L.R. at p. 434; [1956] 1 All E.R. at p. 325, *per* Lord Goddard, delivering the judgment of the court), following *Birkdale Electric Supply Co., Ltd.* v. *Southport Corporation* [1920] A.C. 355 and *R.* v. *Leake* (*Inhabitants*) (1833) 5 B. & Ad. 469. Application of this principle must be a question of fact in each case; here there was little or no likelihood of enlargement of the railway and dedication would not affect the running of it (distinguishing *Ayr Harbour Trustees* v. *Oswald* (1883) 8 App.Cas. 623; see too *Taff Vale Ry.* v. *Pontypridd U. D. C.* (1905) 69 J.P. 351, for a different conclusion on somewhat similar facts). The court also rejected an argument, apparently not pressed in any of the earlier cases, that the applicants could rely upon the Railway Clauses Consolidation Act, 1845, s. 16, conferring power to discontinue works and substitute others.

Fairey v. *Southampton County Council* [1956] 2 W.L.R. 517; [1956] 1 All E.R. 419 (Div.Ct.)

Public right of way—user for over twenty years brought into question—retrospective effect of statute—Public Rights of Way Act, 1932.—This was also an appeal after an application under the National Parks and Access to the Countryside Act, 1949, s. 31. User by the public of a footpath from at least 1885 to 1931 was proved, but thereafter the owner of the land had turned back all but local residents, which action was assumed to be an interruption. The Public Rights of Way Act, 1932, s. 1 (1) provides, *inter alia*, that user for twenty years shall be deemed dedication if the owner of the land has the necessary capacity. The Divisional Court (Lord Goddard C.J. and Hilbery J., Stable J. dissenting) held the Act of 1932 to be substantially procedural in nature and therefore retrospective in effect, so that the periods of user mentioned in the Act could both begin and end before the Act, following *Att.-Gen. and Newton Abbot R. D. C.* v. *Dyer* [1947] Ch. 67. Consequently the public right here was established, for land once dedicated cannot be retaken (*e.g., Jones* v. *Bates* [1938] 2 All E.R. 237 at p. 246). The difference between Lord Goddard (with whom Hilbery J. concurred) and Stable J. turned on the weight to be given to provisions in the Act concerning pending proceedings (s. 2 (1)) and the possible uneven application of retrospective effect. Those who, with Scott L.J. (*Jones* v. *Bates, supra,* at p. 249), regard it to be " of real public moment that no public footpath should be lost " will welcome this affirmation of the Act's retrospective effect, because many public footpaths have fallen into disuse in recent times.

Great Yarmouth Corporation v. *Gibson* [1956] 2 W.L.R. 356; [1956] 1 All E.R. 113 (C.A.)

Sewer—cost of maintenance—claim by local authority—jurisdiction of county court—Public Health Act, 1936, *ss.* 24, 293.—The Public Health Act, 1936, s. 24 (1), permits a local authority to recover the expenses of maintaining sewers from the owners of premises served; by section 24 (3) questions as to the length of sewer, necessity of work, amount and division of expenses may be determined by a court of summary jurisdiction. Section 293 of the Act allows the authority to recover as a civil or simple contract debt any sum " with respect to the recovery of which provision is not made by any other section of this Act." These inelegant provisions divided the Court of Appeal, Evershed M.R. and Romer L.J. holding, with Birkett L.J. dissenting, that the special procedure of section 24 (3) was not sufficient to oust the general jurisdiction of the county court under section 293. The majority recognised, but did not attempt to determine, the existence of procedural difficulties resulting from their decision.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Powell-Cotton's Re-settlement, Henniker-Major and Others v. *Powell-Cotton and Others* [1956] 1 W.L.R. 23; [1956] 1 All E.R. 60 (C.A.)

Settlement—variation—jurisdiction to approve compromises—investment clause—ambiguity—proposed substitution of new clause.—The question here was whether an "old-fashioned" investment clause could be remodelled so as to permit investment in equities. The jurisdiction to approve compromises was invoked on the ground that the words "ordinary preferred stock" in the existing clause were uncertain. The Court of Appeal, proceeding on the view that there was a real doubt about construction, nevertheless held (affirming the unreported decision of Danckwerts J. in chambers) that there was no jurisdiction, or, if there was, that the learned judge had rightly declined to exercise it. The Master of the Rolls (with whom Birkett L.J., the only other member of the court, concurred) preferred to rest his judgment on the latter point, because he was unwilling to lay down rules to fetter the "very useful jurisdiction" of the Chancery judges in matters relating to the execution of trusts. On the broader question of jurisdiction the Master of the Rolls said that the decision in *Chapman* v. *Chapman* [1954] A.C. 429, limited the jurisdiction to "a compromise of disputed rights" which did not exist in the instant case. It was not possible, "by fastening on an ambiguity in a power of investment, to take the opportunity of substituting an entirely new form" ([1956] W.L.R. at p. 29; [1956] 1 All E.R. at p. 64). Whether the beneficial interests conferred by the settlor should be as sacrosanct as they are is arguable (as shown by the judicial conflict in *Chapman* in the various courts), but it does seem, with respect, regrettable if investment clauses are to be similarly regarded. The arguments against variation are not nearly so strong, and in present conditions trustees surely need all possible help in their difficult first duty of preserving the trust property. Of course, a wide investment clause in no way relieves a trustee of his duty to select investments honestly and prudently (see Lewin on *Trusts*, 15th ed., pp. 358–359; *Learoyd* v. *Whiteley* (1887) 12 App.Cas. 727).

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Raine [1956] 2 W.L.R. 449; [1956] 1 All E.R. 355

Surplus after providing charitable gift—gift of residue shows intention to part with entire subject-matter—cy-près doctrine application.—In this case a testatrix left her residuary estate,

amounting to £2,550, to provide seats in a church, after a bequest of £400 to provide a stained-glass window. The £400 was insufficient for the window, whereas all reasonably necessary seating cost only £400. Vaisey J. held that the balance of residue could be applied *cy-près*. The fact that residue was left to a charity showed that no part of it was expected to revert to the estate and this was in itself an indication that the testatrix meant to benefit the church, though there was no other evidence of general charitable intention: *Re Royce* [1940] Ch. 514 was followed. The actual form which the scheme might take was not decided, of course, but no doubt it would be devoted to the church premises. This decision is interesting in that a subjective intention is gathered from the form of the gift rather than its wording or circumstances. Thus a gift to trustees absolutely, on trust for X, does not allow the trustees to benefit if the trust for X fails, as "absolutely" refers to the nature of the interest rather than an intention to confer a benefit. However, here, it is clear that the testatrix intended the whole of the residue to be spent on the church, and merely badly estimated the relative cost of the various items. She wanted the church to benefit at the cost of all her residue.

(Theobald 356, 357)

Re Hanbey's Will Trusts [1956] 2 W.L.R. 23; [1955] 3 All E.R. 874

Failure of purpose of trust—cy-près doctrine—undesirability of overriding express gift over by direction of settlement of scheme.—A gift was made several centuries ago of £5,000 to supply certain specified clothes to the poor of Sheffield and £3,000 to support an elementary Blue Coat School there. The trustees were the Sheffield Cutlers' Company and the testator provided a gift over to Christ's Hospital if the Company failed to carry out the trusts.

As to the £3,000, some possibility of applying the income *cy-près* existed, though the Sheffield school had ceased to exist and its funds were being used to assist secondary education. Whether it would have been a breach of trust to use the trust funds for secondary education is not clear, but quite possible. Probably quite a different scheme would have been preferable.

As to the £5,000, the facts do not make it clear that the original trusts could not have been carried out, but they were obviously inconvenient and out-dated and some scheme for public welfare on modern lines would have been preferable.

The testator had, however, specifically provided that the Blue Coat School in London was to have the funds if the trusts were not observed, which is what had happened. He can hardly, therefore, have wished any *cy-près* scheme to be made.

Danckwerts J. therefore, while asserting a veteran jurisdiction to order schemes even in the presence of gifts over, held that it would be improper to interfere after some years of failure to perform the trusts, and that Christ's Hospital should have the funds. It is curious that there was no clear authority in any previous case.

(Theobald 357)

4. *WILLS*

By A. KIRALFY, Barrister-at-Law

Re Biss [1956] 2 W.L.R. 94; [1956] 1 All E.R. 89

Property bearing its own charges—division of charged asset between specific and residuary devises—all devises no longer specific —specific devise exonerated. A. E. A., 1925, *s.* 35, *contrary intention.* —Legislation, now enacted in section 35 of the Administration of Estates Act, 1925, provides that residue shall not be used to pay off mortgages or charges on other property, but that other property must bear its own charges and be reduced in proportion. This clearly applies as between charged and uncharged property. What happens if the competition is between a specific devisee of part of a charged property and a residuary devisee of another part? Under the pre-1926 law it was clearly laid down in the cases that each devisee bore his proportion of the charge. This rule has been repeated in our books today, though with some compunction. It is said to have been a manifestation of the old idea that all devises are treated as specific so that no distinction could be drawn. The new Act does not give the devisee as such any privilege, and refers to property included in specific devises and bequests as only to be used to pay debts after property included in a residuary devise or bequest. Harman J. in the instant case, in a rather short judgment, has resorted to this principle and applied it to secured as well as unsecured debts. Granted that uncharged property is not taken to exonerate charged property one must still use residuary charged property to exonerate specifically devised charged property.

The effects were very important. The plaintiff had been left land worth £7,250. It was part of the security for a debt of £7,400. Had it borne its proportionate share of the debt *ad valorem*, it would have abated by £3,700. In the event, it was only liable for about £900.

(Theobald 700, Williams on Executors 973)

Re Wilby [1956] 2 W.L.R. 262; [1956] 1 All E.R. 27

Foreign adoption order no qualification for claim to grant of administration. (*Non-contentious Probate Rule* 120B.)—The deceased Miss Skinner died unmarried and was predeceased by her natural parents. In 1926 she was adopted by her aunt and the aunt's husband while they were all domiciled in Burma. At her death she was domiciled in England and died intestate. She had natural brothers and sisters. Barnard J. held that English law would only recognise United Kingdom adoption orders and that her aunt had no claim to a grant. It was suggested that her sister apply for a grant.

(Williams on Executors 177)

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Lower v. *Porter* [1956] 2 W.L.R. 215; [1956] 1 All E.R. 150, C.A.

Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—premium on assignment of tenancy—effect of conversion into two separate dwelling-houses before assignment.—This case decides a point on the construction of section 2 (3) of the Landlord and Tenant (Rent Control) Act, 1949. After a tenancy to which the Rent Acts applied had been granted of a dwelling-house within the Acts, the tenant with the landlord's consent converted the dwelling-house into two self-contained flats (the conversion took place before August 30, 1954). He then assigned the tenancy to the plaintiff for a premium, which the plaintiff later sought to recover as an illegal premium under section 2 of the 1949 Act. The only point was whether the conversion into two separate dwellings took the matter out of section 2 (3), which provides that " this section applies to any tenancy of a dwelling-house, being a tenancy to which the principal Acts apply, such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply." It was argued that the time for applying the second half of the subsection was the time of the assignment, and that this part of the subsection implied that the dwelling-house which was let under the tenancy must remain a single dwelling-house up to the time of the assignment. The Court of Appeal rejected this argument, holding (a) that the second part of the subsection should not be read as if it limited the first part to cases where the dwelling-house remained a single dwelling-house until the date of the assignment, (b) that in any case, even if the time of the assignment had to be looked at, it has been established by such decisions as *Langford Property Co., Ltd.* v. *Goldrich* [1949] 1 K.B. 511 and *Whitty* v. *Scott-Russell* [1950] 2 K.B. 32, that two physically separate dwellings may be let as one. The premium was, therefore, recoverable.

(Megarry, 8th ed., p. 405)

Sherrin v. *Brand* [1956] 2 W.L.R. 131; [1956] 1 All E.R. 194, C.A.

Rent Restrictions Acts—conditional order for possession against statutory tenant — non-compliance with order — death of tenant — " transmission " of statutory tenancy—effect of order.—This case decides a point which was raised but not decided in *Mills* v. *Allen* [1953] 2 Q.B. 341, owing to the operation of the Limitation Act, 1939, in that case. Briefly, the point is, what is the effect where a conditional order for possession has been made against a statutory tenant, the tenant fails to comply with the order but no further proceedings are taken before he dies, and a member of his family claims to succeed to his statutory tenancy by virtue of section 12 (1) (g) of the 1920 Act? In *American Economic Laundry* v. *Little* [1951] 1 K.B. 400, it was held that there can be no " transmission " of the statutory tenancy if an absolute order for possession against the statutory tenant

is made before the latter's death, even if the order is suspended and the tenant's death occurs during the period of suspension. The position where the order is not absolute but conditional was reserved in the *American Economic Laundry* case and in *Mills* v. *Allen,* but it is now established by the present decision that a conditional order does not put an end to the statutory tenancy and does not prevent a "transmission" from taking place. The new tenant will, however, take subject to the conditions of the order. Evershed M.R. repeats the suggestion he made in *Mills* v. *Allen* (at p. 358) in regard to the best form of order where a long suspension is envisaged, but it is still not clear that section 5 (2) of the 1920 Act gives power to make his suggested form of order.

(Megarry, 8th ed., pp. 219, 235, and note 85 on p. 236)

Jackson v. *Croucher* [1956] 2 W.L.R. 331; [1956] 1 All E.R. 170, C.A.

Housing Repairs and Rents Act, 1954—*notice of increase—omission of calculation not material from notice—landlord's notice of election in regard to decorative repairs—effect on permitted increase in respect of old control dwelling-house.*—This case dealt with two points of interest under the Housing Repairs and Rents Act, 1954. Unfortunately on one of the points the Court of Appeal found it unnecessary to give a decision. This was the question whether a notice of repairs increase under the 1954 Act is invalidated if, in a case where the "stopper" does not apply, the notice omits the calculation which would show that it is in fact inapplicable. The court avoided a decision on this point by giving leave to amend, but Evershed M.R. rather leant towards the view that the calculation must be completed even if the result is to show that the "stopper" is inapplicable. The wise course is clearly to complete it. The second point, which the court decided, was that a landlord by serving a notice of election in regard to internal decorative repairs under section 30 (3) of the 1954 Act does not thereby forfeit his right to the full permitted increase (under old control) of 25 per cent. by virtue of section 2 (1) (d) of the 1920 Act.

(Megarry, 8th ed., p. 340)

Lazarus Estates, Ltd. v. *Beasley* [1956] 2 W.L.R. 502; [1956] 1 All E.R. 341, C.A.

Housing Repairs and Rents Act, 1954—*declaration as to repairs—not challenged by tenant within twenty-eight days—whether tenant precluded subsequently from challenging on the ground of fraud.*—A notice of increase under the Housing Repairs and Rents Act, 1954, has to be accompanied by a declaration in a prescribed form that work of repair to the appropriate value has been carried out during the appropriate period. By paragraph 4 of the Second Schedule to the Act the tenant is given a period of twenty-eight days from the service

of the notice of increase in which to challenge the declaration by application to the county court. Paragraph 5 provides that, subject to the machinery provided by paragraph 4, the validity of a declaration " shall not be questioned on the ground that the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this Schedule." The short but important point decided in the present case was whether a tenant is precluded after the expiration of the twenty-eight days from challenging the declaration (*e.g.*, when sued for the increase of rent) on the ground that it is fraudulent. Denning and Parker L.JJ. held that a declaration can be challenged on the ground of fraud outside the twenty-eight-day limit, because " fraud unravels everything," while Morris L.J. dissented, basing his view on the literal meaning of paragraph 5.

(Permanent Supplement to Woodfall, 25th ed., p. 250)

Gilmour Caterers, Ltd. v. *Governors of St. Bartholomew's Hospital*
[1956] 2 W.L.R. 419; [1956] 1 All E.R. 314

Landlord and Tenant Act, 1954—*landlord's intention to demolish or reconstruct—building lease—whether demolition and reconstruction by means of building lease sufficient to satisfy section* 30 (1) (f).—In this case the landlords resisted an application for a new lease under the Landlord and Tenant Act, 1954, on the ground mentioned in section 30 (1) (f) of the Act, namely, that the landlord intended to demolish or reconstruct the premises. The landlords proposed to have the work carried out, not by employing building contractors, but by entering into an agreement under which a building lessee would undertake to demolish and reconstruct the premises in accordance with the landlord's specifications, and would be granted a lease on completion of the work. The only question was whether this satisfied section 30 (1) (f), or whether the landlord must intend to demolish and reconstruct by employing his own servants or agents, or, possibly, building contractors. The Court of Appeal held that the mechanism of a building lease satisfied section 30 (1) (f).

(Permanent Supplement to Woodfall, 25th ed., p. 23)

Uniproducts (Manchester), Ltd. v. *Rose Furnishers, Ltd.*
[1956] 1 W.L.R. 45; [1956] 1 All E.R. 146

Landlord's covenant to repair—defect existing at commencement of tenancy—whether notice or actual knowledge of disrepair necessary. —In this case the landlords had covenanted to keep in repair, *inter alia*, the main structure of a shop. Owing to a failure to repair, a floor in the shop collapsed, injuring the tenants' manager, who recovered compensation from the tenants. The disrepair existed at the commencement of the tenancy. The landlords had not been given notice by the tenants of the defective condition of the floor, nor had the landlords actual knowledge of it. It was held by Glyn-Jones J. that

the rule that a landlord's repairing covenant is to be construed as a covenant to repair on notice applies to defects which were in existence at the commencement of the tenancy just as much as to defects which came into existence during the tenancy. Glyn-Jones J. found it unnecessary to decide the point, which is not yet settled, whether actual knowledge by the landlord *aliunde* would make him liable in the absence of notice from the tenant. There is a dictum by Lord Wright, when a judge of first instance, in *Griffin* v. *Pillett* [1926] 1 K.B. 17, in favour of the view that actual knowledge would suffice, but there is no decision covering the point. The general rule in regard to notice is, of course, well settled by such cases as *Makin* v. *Watkinson* (1870) L.R. 6 Ex. 24, *Torrens* v. *Walker* [1906] 2 Ch. 166, and *Pembery* v. *Lamdin* [1940] 2 All E.R. 434, and has been applied to section 2 of the Housing Act, 1936, by *Morgan* v. *Liverpool Corporation* [1927] 2 K.B. 131, and *McCarrick* v. *Liverpool Corporation* [1947] A.C. 219.

(Woodfall, 25th ed., p. 768)

Miller v. *Emcer Products, Ltd.* [1956] 2 W.L.R. 267; [1956] 1 All E.R. 237

Covenant for quiet enjoyment—easement—right to lavatory accommodation—implied covenant excluded by express covenant—interruption by person outside ambit of express covenant.—In this case the landlords demised certain premises on one floor together with the right to use lavatories on other floors in common with other persons. There was an express covenant for quiet enjoyment of the demised premises without interruption from the landlords, the superior landlords, or persons claiming under or in trust for them. The tenants were prevented from using the lavatory on one floor by a third party who claimed under a title paramount to that of the landlords and the superior landlords. In view of the limitation of the express covenant the tenants claimed damages for breach of an implied covenant or obligation. The Court of Appeal held (1) that the right which the landlords had purported to grant was a legal easement, and was therefore part of the demised premises and fell within the express covenant for quiet enjoyment; (2) that the express covenant excluded any implied covenant for title or quiet enjoyment extending to the same subject-matter on the principle of *Line* v. *Stephenson* (1838) 5 Bing. N.C. 183; (3) since here there was a formal demise there was no room for an implication, such as was allowed in *Coe* v. *Clay* (1829) 5 Bing. 440, of an obligation to put the tenant into possession of the demised premises, since a formal demise, with its implied covenants (operative save so far as excluded by express terms) rendered such an implication unnecessary; (4) it was in any case doubtful whether an obligation to put the tenant into possession could be implied in relation to the grant of a right to use accommodation in common with others; (5) in so far as the decisions in *Coe* v. *Clay* (*supra*) and *Jinks* v. *Edwards* (1856) 11 Exch. 775 depended on the view that a covenant for quiet enjoyment could not be asserted before actual entry, they have been overruled by section 149 (2) of the Law of

Property Act, 1925. The tenants were not, therefore, entitled to damages.

(Woodfall, 25th ed., p. 673)
(See also p. 162, *ante*.)

Wisbech St. Mary Parish Council v. *Lilley*
[1956] 1 W.L.R. 121; [1956] 1 All E.R. 301

Repudiation of landlord's title — tenancy from year to year — whether acts sufficient to amount to repudiation.—It was held in this case that the facts alleged were insufficient to amount to a repudiation by a tenant of his landlord's title. The facts were a sale by the tenant of " all his interest " in the property, plus some evidence of a rather ambiguous nature to the effect that the tenant had alleged that he owned the property and had never paid rent for it. The decision is, however, of some interest because the Court of Appeal recognised the applicability of the old law on this subject stated in *Doe* d. *Ellerbrock* v. *Flynn* (1834) 1 C.M. & R. 137, as qualified in *Doe* v. *Graves, Downe* v. *Wells* (1839) 10 Ad. & E. 427. The general rule that a tenant commits a forfeiture if he disclaims and denies his landlord's title must be qualified, in the case of a lease for a term of years, by requiring something more than an oral disclaimer; in the case of a tenancy from year to year an oral disclaimer may suffice. In either case the disclaimer must amount to a repudiation of the relationship of landlord and tenant.

(Woodfall, 25th ed., pp. 1072–1073)

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6. *REVENUE CASES*

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(*Note*:—Where a case is not reported in any of the general series of law reports, it is cited from *Taxation Reports* (T.R.).)

Aitken v. *Aitken and C. I. R.* [1955] T.R. 337 (Ct. of Sess.)

Income Tax—Child allowance—Apportionment where more than one entitled

Statutory provision: Income Tax Act, 1952, s. 213 (3).

Point: In apportioning the relief granted by Income Tax Act, 1952, s. 212 (commonly known as child allowance and being at present tax at the standard rate on £100), between two or more persons entitled thereto, no account should be taken of minor gifts in estimating " the amount or value of the provision made by them respectively." If

one such person maintains the child out of assets belonging to that person, it is immaterial how such assets were acquired by him or her.

Facts and Decision: In 1947 the husband transferred a public-house in Glasgow to his wife by way of gift. In 1949 the husband and wife separated and the husband contributed nothing towards the upkeep of the children of the marriage but from time to time made minor gifts to them. The wife maintained the children out of her own money, which appears to have been derived from the Glaswegian public-house. The General Commissioners apportioned the child allowance as to 40 per cent. to the husband and as to 60 per cent. to the wife.

Held: Such an apportionment was not justified by the facts and the whole of the relief should be awarded to the wife. The Lord President, after noting that the General Commissioners might have been influenced in their decision by the gift of the public-house, stated (at T.R., p. 338): "If the husband chooses to endow his wife with an asset from which she can and does maintain the children, then he disables himself from claiming relief in respect of the proceeds of that asset."

Jefferson v. *Jefferson* [1955] 3 W.L.R. 1001; [1956] 1 All E.R. 31; [1955] T.R. 321 (C.A.)

Income Tax—Small maintenance payments—Order expressed to be "free of tax"

Statutory provisions: Income Tax Act, 1952, ss. 205, 206 and 207.

Point: Once again an Order for maintenance of the wife was misinterpreted in regard to its effect on the financial position of the parties. The phrase "free of tax" added to an Order for the payment of a sum of £*x* is merely another method of granting "such a sum as after the deduction of tax at the standard rate for the time being in force shall leave the sum of £*x*" (see and compare *J.* v. *J.* [1955] 3 W.L.R. 72; *The Conveyancer*, Vol. 19, at p. 320). The phrase has in fact become a "term of art," and allows a variable sum to be granted without lengthy phraseology. The application of such construction to an Order of the Divorce Division is irrespective of the subsequent taxation position of the parties, and the question of whether or not the payer is entitled to deduct tax at the standard rate on making the payment. If the periodical payments are "small maintenance payments," as defined by Income Tax Act, 1952, s. 205 (normally weekly payments of less than £2), then the provisions for deduction of tax at source, *i.e.*, Income Tax Act, 1952, ss. 169 and 170, are ousted and the sums are taxed in the hands of the payee and deductible by the payer from his assessment. In consequence, where payments are of small weekly amounts, the actual cash to be handed over pursuant to an order for payment of £*x* free of tax is not £*x* but £*x* grossed up at the standard rate.

Facts and Decision: The Divorce Division ordered the husband to make payments to the wife for maintenance "at and after the rate of £52 per annum free of tax, the said sum to be payable weekly."

By means of a standing order to his bankers the husband paid £4 6s. 8d. monthly into his wife's account for some three years. The wife was then advised that she should have received £1 a week grossed up at the standard rate and she accordingly issued a judgment summons claiming the additional payments, then amounting to some £88. The judge upheld the wife's contention and ordered that the husband was to be committed to prison unless he paid off the "debt" at the rate of £5 a month in addition to current payments. The husband appealed.

Held (Denning L.J. dissenting): The learned judge was correct and the appeal should be dismissed. Before giving effect to Income Tax Act, 1952, s. 206, which provides that small maintenance payments should be made without deduction of tax, the Order must be construed to ascertain the amount payable.

It should be noted that the court were unanimous in condemning the insertion of any reference to tax in making an Order for small maintenance payments, thus confirming the general practice which is to omit any such words.

Sharkey v. *Wernher* [1955] 3 W.L.R. 671; [1955] 3 All E.R. 493; [1955] T.R. 277 (H.L.)

Income Tax—Stock-in-trade—Disposal otherwise than by trade

Statutory provision: Income Tax Act, 1918, Schedule D, Case I (now Income Tax Act, 1952, s. 123).

Point: The full effect of this case is unlikely to become known for a considerable time, but it would be exceedingly dangerous to assume that it is a case which should be restricted to its own somewhat special facts. Unlike most cases which receive the attention of our highest tribunal the difficulties surrounding the point at issue were left in the obscurity previously engulfing them. The decision reveals that a taxpayer who carries on two activities, one being a trade taxable under Case I of Schedule D and the other a recreational activity and non-taxable, and who transfers trading stock to the latter from the former, should credit the accounts of his trade with the "*market value*" of the asset transferred and not, as has hitherto been customary, with the "*cost price*" or the "*book value.*" This notional receipt of a payment which is never in fact made or received may or may not be disadvantageous for tax purposes. In the present case an artificial "profit" was thereby created; in the case of many so-called gentleman farmers, who supply their tables with produce from their own farms at a high cost, a loss may prove to be the happy result.

The problem appears to have been treated throughout as one of accountancy, save for the point taken that a man "cannot trade with himself." The consideration constantly recurring was how the taxpayer's "account as a trader can properly be made up," and the result leaves the impression that the market price as a credit was chosen as the better fiction, being analogous to the normal trading receipt, whereas cost price as a credit is analogous to nothing. No analysis of

the position of the trader giving his goods to a third party or selling at an undervalue (compare Income Tax Act, 1952, s. 469) appears, save indirectly or by implication, although it would seem that no distinction was intended to be drawn between those cases and the present (see, *e.g.*, Viscount Simonds at W.L.R., p. 675). The special provisions on discontinuance (Income Tax Act, 1952, s. 143) received no mention. Viscount Simonds, however, made it clear that he attached no importance to the fact that one of the taxpayer's activities was taxable and the other was not.

Hence the short point stated above is all that may be stated with full confidence as the result of this decision. It is, however, pregnant with dire possibilities for the generous trader, the convivial landlord and in particular for the sole trader who attempts to divest himself of his assets with an eye to future estate duty.

Facts and Decision: The taxpayer carried on a stud farm, the profits of which were taxable under Case I of Schedule D. In addition she ran a racing stables to which horses were transferred from the stud farm, these racing stables being a mere recreational enterprise and non-taxable. The taxpayer claimed to credit the trading account of the stud farm with the cost of production of the animals transferred, which was considerably less than their market value, which value the Revenue considered proper as the credit, the taxpayer being assessed on this latter basis. The taxpayer's appeal having been allowed by the Special Commissioners, Vaisey J. reversed their decision in favour of the Revenue. The Court of Appeal restored the Commissioners' decision and the Revenue appealed.

Held (Lord Oaksey dissenting): The appeal should be allowed and the judgment of Vaisey J. restored. In choosing the market value as the correct figure Lord Radcliffe stated (at W.L.R., p. 688): "The realisable value figure is neither more nor less 'real' than the cost figure, and in my opinion it is to be preferred for two reasons. First, it gives a fairer measure of assessable trading profit as between one taxpayer and another, for it eliminates variations which are due to no other cause than any one taxpayer's decision as to what portion of his total product he will supply to himself. A formula which achieves this makes for a more equitable distribution of the burden of tax, and is to be preferred on that account. Secondly, it seems to me better economics to credit the trading owner with the current realisable value of any stock which he has chosen to dispose of without commercial disposal than to credit him with an amount equivalent to the accumulated expenses of that stock. In that sense the trader's choice is itself the receipt, in that he appropriates value to himself *or his donee* direct instead of adopting the alternative method of a commercial sale and subsequent appropriation of the proceeds."

7. *MISCELLANEOUS*

Sobell Industries v. *Cory Brothers & Co.* [1955] 2 Lloyd's Rep. 82

Confirming house—liability for non-acceptance.—In this case foreign buyers sent an order to the plaintiff sellers containing a provision that payment was to be through the defendant confirming house. The defendants sent an order form to the plaintiffs for the same goods. The form had an acknowledgment slip attached which was duly completed by the plaintiffs and returned to the defendants. The foreign buyers failed to accept the goods and the plaintiffs sued the defendants for non-acceptance. The court held, following *Rusholme, Ltd.* v. *S. G. Read, Ltd.* [1955] 1 W.L.R. 146 (noted Vol. 19, at p. 144), that, as between the plaintiffs and defendants, the defendants were in the position of principals and could not withdraw their confirmation. The position in that respect is similar to a confirmed credit. The confirmation of the order by the confirming house is not limited to payment but guarantees that the order will be carried out. Accordingly, the defendants were liable.

Russell v. *Russell* [1956] 2 W.L.R. 544; [1956] 1 All E.R. 466

Husband and wife — maintenance — undertaking not to apply to reduce justices' maintenance order—validity.—In *Hyman* v. *Hyman* [1929] A.C. 601 the House of Lords laid down the principle that a husband and wife cannot by agreement oust the court's jurisdiction to adjudicate upon the question of the husband's liability to maintain his wife. This principle was applied by the Court of Appeal in *Bennett* v. *Bennett* [1952] 1 K.B. 249 and *Shott* v. *Shott* [1952] 1 All E.R. 735. It is a well known fact that a wife often defends divorce proceedings merely to ensure that she receives adequate maintenance, for she will be advised that no bargain she makes can prevent the husband going to the court when circumstances change, *e.g.*, on his remarriage and the birth of children of the later marriage, for a reduction of any maintenance agreed upon. In the instant case the wife respondent had, at the date of the hearing of the divorce petition, a justices' order in her favour and she defended the proceedings merely to protect herself with regard to maintenance. As the husband's petition seemed doomed to failure the wife agreed to cross-petition for divorce on the husband's undertaking given to the court that he would not seek a reduction of the justices' order; and a decree *nisi* was granted to the wife on this footing.

The husband remarried and a child of the second marriage was born in due course. He then applied to the justices for a reduction of the maintenance order, which was refused because of the undertaking. He next applied to the Divorce Court for the discharge of the undertaking, which was refused, and, from this refusal, he appealed to the Court of Appeal. The court held that the undertaking was not void as contrary to public policy and, with respect, this seems to be right, for the whole decision was on the footing of the undertaking and, if the husband objected to it, he should have appealed at the

time, in which event, if he had been successful, the wife would almost certainly have sought to have obtained a judicial separation instead of a divorce. The court also held that the undertaking could be discharged but the husband would have to show a change in circumstances amounting to hardship. It seems doubtful whether the wife would have been prepared to cross-petition had she known that the undertaking was subject even to this qualification.

What seems more difficult to reconcile with the earlier cases is the proposition laid down by Jenkins L.J. that there is nothing contrary to public policy in an ordinary agreement, not in any way approved by the court, that the husband will not apply for the reduction of a maintenance order below a specified sum. It is true that the effect of such an agreement would not curtail the wife's rights in the least degree, but is not the jurisdiction of the court to be exercised in the public interest for the benefit of all parties concerned including the second spouse and any children of the second marriage? However, even if the proposition is soundly based it has narrow scope for operation for, as Jenkins L.J. said, "it is much better to make sure that such matters should not savour of bargaining. The questions of maintenance should be reserved to be dealt with after the case has been heard out and not at a stage at which the position in regard to maintenance may influence one party or the other in the conduct of the proceedings. Proceedings such as these, of course, concern matters of status, and it is a truism to say that they should not be made the subject of any bargaining."